(1)
Supreme Court, U.S.
FILED

03 396 SEP 8 2003
No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HARRY SHUSTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Brian C. Southwell
Attorney for Harry Shuster
MN ID #103706
701 - 4th Ave. South, Suite 500
Minneapolis, MN 55415
612-337-9573

Attorney for Petitioner

QUESTION PRESENTED

Whether, as the Courts of Appeals for the First, Third, Seventh, Eighth and D.C. Circuits have held, in conflict with the decision below and decisions of the Fourth, Sixth, and Ninth Circuits, when one party has introduced a portion of a recorded statement, Federal Rule of Evidence 106 allows admission of otherwise inadmissible but relevant evidence from the writing or recorded statement in order to prevent distortion or misunderstanding or to qualify, explain, or place into context the portion already introduced?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Second Circuit.

TABLE OF CONTENTS

	Page:
Question Presented for Review	i
List of Parties to the Proceedings in the Courts Below	ii
Table of Contents	iii
Table of Authorities	v
Petition for Writ of Certiorari	1
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions, Treaties, Statutes, Rules, and Regulations Involved	2
Statement of the Case	4
Reasons for Granting the Writ	9
I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A LONGSTANDING AND ACKNOWLEDGED CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS AS TO WHETHER RULE 106 ALLOWS THE ADMISSION OF OTHERWISE INADMISSIBLE BUT RELEVANT EVIDENCE IN ORDER TO PREVENT DISTORTION OR MISUNDERSTANDING OR TO QUALIFY, EXPLAIN, OR PLACE INTO CONTEXT A PORTION OF EVIDENCE ALREADY INTRODUCED	**9**

A. The Federal Courts of Appeals Are Divided On The Proper Interpretation of Rule 106.....9
B. The Redaction of the Depositions Under the Second Circuit's Erroneous Application of Rule 106 Distorted Crucial Trial Evidence, With Material Impact On Petitioner's Trial.....11
Conclusion.....14
Appendix.....15
USCA Opinion Dated 6-10-03.....A
USDC Judgment & Commitment Order Entered 7-12-02.....B
USDC Order Denying Request to Depose Montague Koppel Dated 5-25-01 (Entered 6-11-01).....C
Shuster Objections To Redaction Of Depositions Dated 7-13-01.....D
Consent Order Of Forfeiture Dated 7-3-02.....E

TABLE OF AUTHORITIES

Page:

Cases

Acceptance Corp. v. Household Retail Serv., Inc.,
267 F.3d 1068, 1089 n.12 (10th Cir. 2001) *10*

Beech Aircraft Corp. v. Rainey,
488 U.S. 153, 172 (1988) *11,*

Trepel v. Roadway Express Inc.,
194 F.3d 708, 718 (6th Cir. 1999) *9*

United States v. Awon,
135 F.3d 96, 101 (1st Cir. 1998) *8, 9, 10*

United States v. Collicott,
92 F.3d 973; 1996 U.S. App. LEXIS 27382
(9th Cir. 1996) *9*

United States v. LeFevour,
798 F.2d 977, 980-82 (7th Cir. 1986) *8, 9, 10*

United States v. Pendas-Martinez,
845 F.2d 938, 944 & n. 10 (11th Cir.1988) *10*

United States v. Sutton,
801 F.2d 1346, 1368 (D.C. Cir. 1986) *8, 9, 10*

United States v. Terry,
702 F.2d 299, 314 (2d Cir.1983) *9*

United States v. Wilkerson,
84 F.3d 692, 696 (4th Cir. 1996) *9*

Statutes

28 U.S.C. § 1254(1) *2*

Other Authorities

1 Weinstein's Federal Evidence § 106.02[1] *14*

21 C. Wright & K. Graham,
Federal Practice and Procedure,
§§ 5072, 5078 (1977 & Supp.1987) *11*

Weinstein's Federal Evidence
(2d ed. 2003) 106.03[1], at 106-14 to 17 ..... *11*

Rules

Federal Rule of Evidence 106 ..... *passim*

Sup. Ct. Rule 10(a)..... *11*

PETITION FOR A WRIT OF CERTIORARI

Petitioner Harry Shuster respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

On June 10, 2003, the Court of Appeals for the Second Circuit issued both a published decision and an unpublished summary order in this case. The published decision is reported at 331 F.3d 294; 2003 U.S. App. LEXIS 11504, and is reprinted in the separate Appendix A to this Petition. The unpublished summary order is reported at 2003 U.S. App. LEXIS 11545 and appears following the published decision in Appendix A to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Eastern District Of New York, entered on July 12, 2002, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior opinion and judgment of the United States District Court for the Eastern District Of New York, Denying Petitioner Shuster's request to depose Montague Koppel in London, is an unpublished decision, and is reprinted in the separate Appendix C to this Petition.

A supplemental consent order with regard to forfeiture issues was entered 7-3-02. This consent order is unpublished and is reprinted in the separate Appendix E to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 6-10-03. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Federal Rule of Evidence 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. *Id.* Rule 106.

STATEMENT OF THE CASE

This case presents an opportunity for this Court to resolve a longstanding, acknowledged split among the federal Courts of Appeals about the proper interpretation of Rule 106 of the Federal Rules of Evidence. Several federal courts of appeals have held that when one party introduces part of a written or recorded statement, Rule 106 allows the other party to introduce other parts of the same statement that would otherwise be inadmissible in order prevent confusion or distortion. *See infra* at 8-10. Other courts, including the Second Circuit, have held that Rule 106 does not authorize the admission of otherwise inadmissible evidence. *See id.* Applying the latter rule, the courts below allowed respondent to introduce large portions of deposition testimony suggesting that petitioner Harry Shuster was the owner of Plus One Finance Limited ("Plus One"), an offshore company managed in Switzerland, but excluded as hearsay other portions of the same testimony indicating that he was not. As a result, the redacted deposition testimony presented

a fundamentally misleading impression about the central issue at trial.

Under the law of the First, Seventh, and D.C. Circuits, the portions of the depositions that the district court excluded as hearsay would have been admissible under Rule 106, and the jury would not have been left to decide a crucial issue on the basis of a misleading redaction. This Court should grant certiorari to resolve the longstanding conflict concerning Rule 106 and to permit the consideration of central evidence in the criminal prosecution of Mr. Shuster.

A. Pre-Trial Proceedings

On May 25, 1999, a grand jury in the Eastern District of New York returned an indictment charging petitioner with one count of securities fraud conspiracy, *see* 18 U.S.C. §§ 371 and 3551; two counts of securities fraud, *see* 15 U.S.C. §§ 78j(b) and 78ff, and one count of money laundering conspiracy, *see* 18 U.S.C. § 1956. These charges arose from the purchase and sale of unregistered U.S. securities by Plus One, a B.V.I. company managed by Kestrel, S.A. ("Kestrel"), a Swiss investment services company. JA 36.[1] The indictment alleged, in substance, that Petitioner used Plus One to buy and sell unregistered shares of Dollar Time, Inc. ("Dollar Time") and Aquanatural, Inc. ("Aquanatural"), under Regulation S, a Securities and Exchange Commission ("SEC") regulation authorizing the sale of unregistered securities to foreign purchasers. *Id.* The essence of the charges was that Petitioner and coconspirators bought unregistered shares through false representations that Plus One was a foreign purchaser, when in fact it belonged to

---

[1] Numbers preceded by "JA" refer to the pages of the Joint Appendix filed in the Court of Appeals. "Tr." refers to the transcript of the trial in the district court between July 9 and August 1, 2001. Transcripts from pre- and post-trial proceedings are designated with their date (e.g., "6/21/02 Tr.").

Petitioner. JA 39. The indictment also sought forfeiture of the laundered funds under 18 U.S.C. § 982.

On August 25, 2000, the grand jury returned a seven-count superseding indictment that omitted Aquanatural, but added new counts and allegations. The superseding indictment expanded the conspiracy charged in Count One, alleging that Petitioner participated in fraudulent securities offerings underwritten by Stratton Oakmont ("Stratton"), a corrupt brokerage firm founded and operated by Jordan Belfort and Daniel Porush. The superseding indictment alleged that Petitioner helped Stratton manipulate certain securities, and added four counts of securities fraud in connection with specified securities. *See* 15 U.S.C. § 78j(b), 15 U.S.C. § 78ff. JA 60-61, 68-72. On 10-26-00, the grand jury returned a second superseding indictment, further expanding the conspiracy in Count One and specifying substitute assets in its forfeiture allegations. JA 78.

Because the government's case turned on its assertion that petitioner was the owner of Plus One, petitioner made a pre-trial motion Federal Rule of Criminal Procedure 15 to take the depositions of Imrie and Screech, the Kestrel personnel responsible for managing the affairs of Plus One and for opening its bank account. In support of this motion, petitioner explained that Imrie and Screech would testify that they had been told that petitioner's parents were the true owners of Plus One, but that the parents could not acknowledge their ownership because South African law prohibited resident citizens from holding assets offshore. Accordingly, to shield petitioner's parents, Imrie and Screech took instructions from petitioner. The government consented to the depositions, and the district court granted the Rule 15 motion.

Imrie, the founder of Kestrel, testified that during the *apartheid* era many South Africans moved assets outside the country to hedge against political instability, despite "draconian" laws against doing so. Tr. 1126-27. Kestrel had

many South African clients, who valued anonymity because it shielded them from South African authorities. Tr. 1129. Some Kestrel clients held funds through offshore bearer share corporations, which "shield[ed] predominantly South-African clients . . . from having their own names attached to pieces of paper." Tr. 1160. In the 1980s, South African authorities used pretexts to pierce Swiss bank secrecy. Tr. 1164. Kestrel commonly took instructions about South African accounts from family members living abroad. Tr. 1189. Imrie also explained that one of his clients, Montague Koppel, referred many South Africans to Kestrel, and sometimes conveyed their assets to Kestrel. Tr. 1168-69.

Imrie testified that in early 1990 Koppel told him to expect funds belonging to Morris Shuster, who lived in South Africa, and to take instructions about those funds from petitioner, Morris' son, who lived in the United States, or from Koppel. Deposition of Walton Imrie ("Imrie Dep.") 38-40. Koppel told Imrie that the funds were the proceeds of the sale of a business, *id.* at 46, and that petitioner could invest them for his elderly parents as he saw fit, but to advise Koppel of the investments and not to allow the account to fall below approximately $250,000. Imrie Dep. 55-56. When Morris died in August 1990, Koppel told Imrie that Mrs. Shuster was still alive and that he should still take instructions from petitioner. Imrie Dep. 57-58. Imrie understood that Mrs. Shuster owned the funds. Imrie Dep. 263-64. Plus One was later created to hold funds for "Koppel's client and/or Shuster family." Imrie Dep. 79; Tr. 1204-05. Imrie testified that he understood the Plus One funds to belong to Shuster's "mother and father." Imrie Dep. 81, 85.

Screech testified that he thought that Plus One "belonged to the [Shuster] family and [was] being looked after by Harry [*i.e.*, petitioner]." Deposition of Stephen Screech ("Screech Dep.") 456. Imrie told him that Shuster was managing the assets of his "elderly parents in South Africa who couldn't

access us easily." *Id.* 456-57. Screech understood that Koppel controlled the Kestrel account (called "Sonnenburg-Shuster") in which the Plus One funds were originally held, *id.* 487, and that he had to consult Koppel before authorizing transactions in that account. *Id.* 460-61. Screech testified that it was common for children to manage the assets of South African parents, *id.* 463, and that petitioner's conduct was consistent with managing funds for an elderly parent in South Africa. *Id.* 464. Screech understood that the $900,000 originally deposited in Sonnenburg-Shuster was the proceeds of a joint investment by Koppel and Morris Shuster in a restaurant deal. *Id.* 485. Screech was told that Sonnenburg-Shuster belonged to Koppel and Morris, and that he had to consult Koppel before executing transactions with those funds. Id. 491. In April 1992 Koppel's share of the restaurant proceeds was transferred to another account, and Morris's share went to Plus One. *Id.* 504; 511.

Against this background, Imrie and Screech also testified that they received advice about Plus One from petitioner and followed that advice precisely. The government elicited testimony about numerous Plus One investments (including the purchase and sale of securities underwritten by Stratton) directed by petitioner and carried out by Screech and Imrie.

B. Trial Proceedings

Trial began on July 9, 2001, before the Honorable John Gleeson. The government's assertion that petitioner owned Plus One was the linchpin of its case against him. The government's theory was that Belfort allowed Shuster to participate in Stratton's massive securities fraud in exchange for an ownership interest in Plus One. Belfort testified that by acquiring a 50% interest in Plus One, and then allowing Plus One to profit in fraudulent securities transactions, he was able to move the illegal proceeds of those transactions offshore, away from creditors and regulators. Thus, petitioner's alleged ownership of Plus One provided the basis

for his knowing participation in Plus One, and also the legal predicate for the Regulation S and money laundering violations alleged in the indictment.

The government introduced the depositions of Imrie and Screech in its case in chief, but moved to exclude all their testimony about the ownership of Plus One, arguing that it consisted of hearsay statements from Koppel or rested upon knowledge acquired from such statements. The district court granted this motion, Tr. 47-48, and redacted the deposition transcripts accordingly. The defense objected that the redactions distorted their testimony, in violation of the "rule of completeness," *see* Fed. R. Evid. 106, JA 273, (Appendix D) and moved for a mistrial during the trial. Tr. 2208-09. The court denied the motion and declined to read the unredacted testimony or to exclude the other portions of the testimony.

On August 1, 2001, the jury returned guilty verdicts on all counts. Tr. 3325-26. On June 21, 2002, Judge Gleeson sentenced petitioner to 72 months imprisonment, imposed a $100,000 fine, and approved a consent order of forfeiture by which petitioner agreed to forfeit $6,000,000. The district court entered the judgment of conviction on July 12, 2002.

C. Proceedings on Appeal

Petitioner argued in the Court of Appeals that the district court eviscerated his defense by excluding all evidence that his parents owned Plus One. In particular, petitioner argued that the redaction of the Imrie and Screech depositions was improper and misleading, and that the redacted portions should have been admitted into evidence under the rule of completeness embodied in Federal Rule of Evidence 106 even if they were not otherwise admissible. Appellant's Brief ("App. Br.") 61. Petitioner acknowledged that Second Circuit precedent precluded the introduction of otherwise inadmissible evidence under Rule 106, but argued that the First, Seventh, and District of Columbia Circuits had a better view of the Rule and would allow the admission of

the redacted evidence even if it was otherwise inadmissible. App. Br. 61 (citing *United States v. Awon*, 135 F.3d 96, 101 (1st Cir. 1998) (allowing otherwise inadmissible evidence in under Rule 106); *United States v. LeFevour*, 798 F.2d 977, 980-82 (7th Cir. 1986) (same); *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986) (same)).

On June 10, 2003, the Court of Appeals affirmed petitioner's conviction by an unpublished summary order, without addressing his argument that the Court of Appeals should follow First, Seventh, and DC Circuit precedent by allowing the jury to consider the redacted portions of the Imrie and Screech depositions under Rule 106. In a published opinion issued on the same day, the Court of appeals rejected the government's cross-appeal and affirmed petitioner's sentence.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A LONGSTANDING AND ACKNOWLEDGED CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS AS TO WHETHER RULE 106 ALLOWS THE ADMISSION OF OTHERWISE INADMISSIBLE BUT RELEVANT EVIDENCE IN ORDER TO PREVENT DISTORTION OR MISUNDERSTANDING OR TO QUALIFY, EXPLAIN, OR PLACE INTO CONTEXT A PORTION OF EVIDENCE ALREADY INTRODUCED.

A. The Federal Courts of Appeals Are Divided On The Proper Interpretation of Rule 106.

In rejecting petitioner's argument about the redaction of the Screech and Imrie deposition transcripts, the Court of Appeals faithfully applied a longstanding circuit precedent, that "Rule 106 does not 'render admissible evidence that is otherwise inadmissible.'" *United States v. Guevara*, 277 F.3d 111, 127 (2nd Cir. 2001) (quoting *United States v. Terry*, 702 F.2d 299, 314 (2d Cir.1983)). Several Courts of Appeals interpret Rule 106 in much the same way. *See, e.g., United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) (Rule 106 does "not render admissible the evidence which otherwise is inadmissible under hearsay rules"); *Trepel v. Roadway Express Inc.*, 194 F.3d 708, 718 (6th Cir. 1999) (same); *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996) (same).

Equally well-settled and longstanding precedent in other federal circuits adopts the opposite approach, permitting the admission of otherwise inadmissible materials in order to ensure that the presentation of only part of a document does not render it misleading or confusing. For example, the D.C. Circuit has held that "Rule 106 can

adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously." *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986) . Similarly, Judge Posner has written for the Seventh Circuit that "[i]f otherwise inadmissible evidence is necessary to correct a misleading impression, then either it is admissible for this limited purpose by force of Rule 106 . . . or, if it is inadmissible (maybe because of privilege), the misleading evidence must be excluded too." *United States v. LeFevour*, 798 F.2d 977, 981 (7th Cir. 1986) (Posner, J.); *see also United States v. Awon*, 135 F.3d 96, 101 (1st Cir. 1998) ("This [completeness] doctrine, codified in Fed.R.Evid. 106, holds that an otherwise inadmissible recorded statement may be introduced into evidence where one side has made a partial disclosure of the information, and full disclosure would avoid unfairness to the other party.").

Thus, the Imrie and Screech depositions would have been admissible in their entirety in at least the First, Seventh, and D.C. Circuits, while they would have been similarly redacted in the Fourth, Sixth, and Ninth Circuits. This longstanding division of authority has not gone unnoticed by other courts. *See, e.g., Echo Acceptance Corp. v. Household Retail Serv., Inc.*, 267 F.3d 1068, 1089 n.12 (10th Cir. 2001) (noting circuit split but declining to resolve it on facts presented); *United States v. Pendas-Martinez*, 845 F.2d 938, 944 & n. 10 (11th Cir.1988) (noting that "there are conflicting Circuit Court decisions on whether [Rule 106] makes admissible parts of a document that otherwise would be inadmissible under the Rules of Evidence"). In addition to the courts, influential treatises on the law of evidence have also noted the division of authority and taken conflicting views about its proper resolution. *Compare* 21 C. Wright & K. Graham, *Federal Practice and Procedure*, §§ 5072, 5078 (1977 & Supp. 2003) (noting split and arguing that Rule 106

permits introduction of otherwise inadmissible evidence) with Weinstein's Federal Evidence (2d ed. 2003) 106.03[1], at 106-14 to 17 (identifying split but taking position that Rule 106 addresses only an order of proof problem and does not make admissible what is otherwise inadmissible).

In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988), this Court acknowledged the question presented here, but declined to provide an answer. In the intervening years, the courts of appeals have addressed the issue with the widely varying results described above. This conflict shows no signs of resolving itself; indeed, the opposing positions are hardening rather than harmonizing. Moreover, this unsettled question recurs with great frequency, resulting in unfairness and great uncertainty. As the facts of this case make clear, the application of Rule 106 has an enormous impact on the evidence that juries ultimately hear, and on the grounds for their decisions. The outcome of litigation should not depend on the location of the court in which it occurs. This Court should grant certiorari to resolve the conflict among the federal courts of appeals on this persistent and important issue. *See* Sup. Ct. Rule 10(a).

B. The Redaction of the Depositions Under the Second Circuit's Erroneous Application of Rule 106 Distorted Crucial Trial Evidence, With Material Impact On Petitioner's Trial.

The thrust of petitioner's defense was that Plus One belonged not to him, but to his parents, and that he assisted them in managing its investments. Establishing the true ownership of Plus One was crucial, for it would have (1) placed Plus One's purchase of unregistered securities inside the safe harbor of Regulation S; (2) contradicted Belfort's claim that petitioner gave him half of Plus One as part of a money laundering scheme, thereby eliminating Belfort's claimed incentive to allow Petitioner to profit in Stratton's offerings; (3) explained the secretive quality of petitioner's

correspondence with Kestrel; (4) eliminated the factual basis for the government's money laundering theory; and (5) explained alleged "bad" acts erroneously admitted into evidence.

Taken in their entirety, the Imrie and Screech depositions indicated that Harry Shuster played a key role in the affairs of Plus One, and that Imrie and Screech willingly accepted his instructions, but also explained the underlying reasons why they did so. Imrie and Screech believed that petitioner was acting for his parents, the true owners of Plus One. But the redaction of their testimony to eliminate the explanation for the actions of Screech and Imrie changed the entire thrust of their testimony. Hearing that the managers of Plus One answered only to petitioner, without learning why, the jury could only conclude that he was the owner of its assets. Thus, by redacting these depositions, the district court altered their meaning in fundamental way that effectively decided the question of Plus One's ownership in favor against petitioner.

To implement its rulings, the court excised not only statements it deemed hearsay, but also testimony about facts allegedly learned from other parties. For example, the court excluded testimony from Imrie and Screech that Koppel instructed them to take instructions from Petitioner about the Sonnenburg-Shuster funds, but to obtain Koppel's permission for certain transactions. Imrie Dep. 39-40, 55-56; Screech Dep. 490. Over defense objection, the court allowed the government to skip Screech's observation, responding to a government question, that Petitioner had not behaved consistently with ownership of Plus One because, in Screech's experience, clients seeking secrecy maintained greater distance from their accounts. Screech Dep. 545-46. Though this testimony was not hearsay, the court kept it from the jury on the ground that the government elicited it in response to hearsay. This testimony should have been admitted. Combined with the elimination of the so-called

hearsay, such redactions of the Imrie and Screech depositions rendered them fundamentally misleading. The unredacted testimony showed that Imrie and Screech accepted Petitioner's instructions about Plus One because they thought he was acting for his parents. Their testimony also reflected the belief that Koppel initially owned or controlled some of the assets that funded Plus One. The court's redactions transformed the depositions, leaving the false impression that Screech and Imrie always believed that Plus One belonged to Petitioner, and followed his instructions for this reason alone. To correct the distorting effect of its redactions, the court should have allowed the jury to hear the entire testimony of Screech and Imrie.

Even those statements deemed otherwise inadmissible hearsay should have been admitted under the "rule of completeness" embodied in Federal Rule of Evidence 106. This Rule provides that if a "writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part ... which ought in fairness to be considered contemporaneously with it." *Id.* The "rule of completeness" seeks to avoid "misleading impressions created by taking statements in documents or recordings out of context." 1 *Weinstein's Federal Evidence* § 106.02[1]. To this end, courts may require the inclusion of an entire statement, or to preclude the introduction of any part of it. *Id.* Because the Imrie and Screech testimony essentially turned on their understanding of the ownership of Plus One, admission of the Koppel statements was necessary to convey a proper view of that testimony. Thus, if the government insisted upon introducing parts of that testimony, the court should have permitted the admission of the alleged hearsay.

In short, Second Circuit's erroneous interpretation of Rule 106 led the district court to redact crucial deposition testimony in a misleading manner, compromising the integrity and fairness of the trial. Because that error casts

serious doubt upon petitioner's conviction, this Court should grant the petition for certiorari.

CONCLUSION

For all of the foregoing reasons, Petitioner Harry Shuster respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Brian C. Southwell
Attorney for Petitioner
MN ID #103706
701 - 4th Ave. South, Suite 500
Minneapolis, MN 55415
(Phone: 612-337-9573)

Date: _____

No.

IN THE

Supreme Court of the United States

HARRY SHUSTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

APPENDIX

COMES NOW PETITIONER Harry Shuster and submits the attached appendix pursuant to Supreme Court Rules.

Brian C. Southwell
MN ID #103706
701 - 4th Ave. South, Suite 500
Minneapolis, MN 55415
(Phone: 612-337-9573)

Date:_____

Attorney for Petitioner

APPENDIX A

ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DATED 6-10-03

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,
v.
HARRY SHUSTER,
Defendant-Appellant-Cross-Appellee.
Docket No. 02-1417L, -1487XAP
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
331 F.3d 294; 2003 U.S. App. LEXIS 11504
March 31, 2003, Argued
June 10, 2003, Decided

SUBSEQUENT HISTORY: Supplemental opinion at *United States v. Shuster*, 2003 U.S. App. LEXIS 11545 (2d Cir. N.Y., June 10, 2003)

PRIOR HISTORY: [**1] Appeal from the July 12, 2002, judgment of the United States District Court for the Eastern District of New York (John Gleeson, District Judge), sentencing the Defendant to six years of imprisonment for securities fraud and money-laundering offenses.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed a judgment of the United States District Court for the Eastern District of New York, sentencing him to six years of imprisonment for securities fraud and money laundering offenses. The Government cross-appealed.

OVERVIEW: Defendant complained primarily of various alleged trial errors. The Government contended that the trial court should have made a four-level increase in defendant's adjusted offense level because his offense involved a fraud "affecting" a financial institution within the meaning of former U.S. Sentencing Guidelines Manual § 2F1.1(b)(6)(B) (1997) (deleted effective 2001). The instant

court, which rejected defendant's contentions, concluded that the Government's contention did not need to be adjudicated because the record made clear that, even if the enhancement were required, the trial court's departure down to six years would have remained unaffected. The instant court noted that the trial court made a downward departure to 72 months based upon the combined effect of extraordinary family circumstances, charitable works, and age. The trial court made it clear that, even if the enhancement applied, it would still have departed down to the same 72-month sentence that it imposed.

OUTCOME: The judgment was affirmed on the appeal and the cross-appeal.

COUNSEL: Jeremy Maltby, New York, N.Y. (Alan M. Cohen, Scott A. Thompson, O'Melveny & Myers, LLP, New York, N.Y., on the brief), for Defendant-Appellant.

Ronald G. White, Asst. U.S. Atty., Brooklyn, N.Y. (Roslynn R. Mauskopf, U.S. Atty., David C. James, Asst. U.S. Atty., Brooklyn, N.Y., on the brief), for Appellee.

JUDGES: Before: NEWMAN, POOLER, and KATZMANN, Circuit Judges.

OPINIONBY: JON O. NEWMAN

OPINION: [*295] JON O. NEWMAN, Circuit Judge.

This appeal in a criminal case merits a brief opinion only to indicate a circumstance in which a reviewing court need not adjudicate a Sentencing Guidelines dispute, in this instance a claim by the Government that a sentencing judge erred in declining to make an upward adjustment that the Government contends was required. Harry Shuster appeals from the July 12, 2002, judgment of the District Court for the Eastern District of New York (John Gleeson, District Judge) sentencing him principally to six [**2] years of imprisonment for securities fraud and money-laundering offenses. He complains primarily of various alleged trial errors. The Government cross-appeals, contending that the District Court should have made a four-level increase in the

Defendant's adjusted offense level because his offense involved a fraud "affecting" a financial institution within the meaning of U.S.S.G. § 2F1.1(b)(6)(B). We conclude that the Government's contention need not be adjudicated because the record makes clear that, even if the enhancement were required, the District Judge's departure down to six years would remain unaffected. The Defendant's contentions have been rejected in a summary order filed today. We therefore affirm on the appeal and the cross-appeal.

Background

Shuster's criminal conduct primarily involved a "boiler room" operation in which he arranged purchases from, and sales to, Stratton-Oakmont, Inc., a broker-dealer, of stock in several initial public offerings. His activities resulted in an artificial inflation of stock prices from which he profited more than $ 2 million. We set forth only the facts needed for understanding of the one sentencing issue considered in this opinion. [**3]

At sentencing, the District Court initially calculated Shuster's total adjusted offense level to be 31. The Government sought a four-level enhancement pursuant to U.S.S.G. 2F1.1(b)(6) (1997), which applies [*296] where an offense "substantially jeopardized the safety and soundness of a financial institution," *id.* § 2F1.1(b)(6)(A), or "affected a financial institution and the defendant derived more than $ 1,000,000 in gross receipts from the offense," *id.* § 2F1.1(b)(6)(B). Judge Gleeson ruled that neither subsection of section 2F1.1(b)(6) applied. Because the Government's cross-appeal concerns only the ruling not to apply subsection 2F1.1(b)(6)(B), we need not consider the ruling as to subsection 2F1.1(b)(6)(A). As to the (B) subsection, there was no dispute that Stratton-Oakmont was a financial institution or that Shuster derived more than $ 1 million in gross receipts. Thus the issue for Judge Gleeson was whether Shuster's conduct "affected" Stratton-Oakmont in the sense contemplated by the guideline.

After ruling that the (B) subsection did not apply, Judge Gleeson stated alternatively that if his view about this subsection was wrong and if he had the discretion to make a downward [**4] departure because of Shuster's role in the offense, he would downwardly depart four levels "because of [Shuster's] role."

The adjusted offense level of 31 and the applicable Criminal History Category I specified a range of imprisonment of 108-135 months. However, Judge Gleeson made a downward departure to 72 months pursuant to U.S.S.G. § 5K2.0 based upon the "combined effect of extraordinary family circumstances; charitable works; and age."

The Government's cross-appeal does not challenge the downward departure, but does challenge the decision not to make a four-level upward adjustment to the offense level under subsection 2F1.1(b)(6)(B).

Discussion

In contexts slightly different from this case, we have ruled that guideline disputes that would not have affected the ultimate sentence need not be adjudicated on appeal. One example is where a sentence falls within any two of the adjacent overlapping ranges of the Guidelines sentencing table, see U.S.S.G. Ch. 5, Pt. A (Sentencing Table), the parties challenge some adjustment that would affect which of the two ranges is applicable, and the sentencing judge makes clear that the same sentence would have been imposed whichever one [**5] of the two ranges applied. See *United States v. Bermingham*, 855 F.2d 925, 934-35 (2d Cir. 1988) (reviewing court "need not select between the two arguably applicable guideline ranges if it is satisfied that the same sentence would have been imposed under either guideline range"). We have applied *Bermingham* in declining to adjudicate disputes concerning: offense level adjustments, *United States v. Tracy*, 12 F.3d 1186, 1203 (2d Cir. 1993); *United States v. Garcia*, 936 F.2d 648, 656 (2d Cir. 1991); grouping, *United States v. Santopietro*, 166 F.3d 88, 95 (2d

Cir. 1999); and the appropriate offense guideline, *United States v. McHugh*, 122 F.3d 153, 158; *id.* at 159 (2d Cir. 1997) (Newman, J., concurring).

Especially pertinent to the pending appeal, we have applied *Bermingham* in the context of a departure, ruling that a challenge to which of two criminal history categories was the appropriate category to which a sentencing judge could depart need not be adjudicated where the same sentence would have been imposed in any event. *United States v. Larson*, 112 F.3d 600, 606 (2d Cir. 1997); [**6] *United States v. Mayo*, 14 F.3d 128, 132 (2d Cir. 1994). Also pertinent are cases in which we have remanded for resentencing because of uncertainty as to whether a sentencing judge who granted a downward departure would have made the same or a greater departure if the applicable adjusted offense level and corresponding presumptive sentencing [*297] range had been correctly determined. *See United States v. Moon*, 926 F.2d 204, 210 (2d Cir. 1991) (sentence departing from guideline range of 78-97 months down to 48 months remanded where correct guideline range was 63-78 months); *United States v. McCall*, 915 F.2d 811, 814-16 (2d Cir. 1990) (sentence departing from guideline range of 151-188 months down to 108 months remanded where correct guideline range was 87-108 months). Neither of the sentencing judges in *Moon* and *McCall* had indicated that they would have imposed the same sentence if they had considered a departure from a lower guideline range.

In the pending case, we have sufficient guidance from the sentencing judge to preclude the need for resentencing. After ruling that the four-level enhancement for "affecting" a financial institution [**7] was not applicable, Judge Gleeson stated, alternatively, that if his view of the enhancement were incorrect, he "would downwardly depart four levels because of [Shuster's] role [in the offense]." Judge Gleeson thereby made it clear that, even if the enhancement applied, he would still depart down to the same 72-month sentence that he imposed. The Government responds that the enhancement, if

applicable, would have increased Shuster's ultimate sentence because a four-level downward departure for role in the offense would not have been warranted. Whether or not that is so, Judge Gleeson has sufficiently indicated that he would use his departure discretion, even if he started from a higher level, to end up with a 72-month sentence.

Conclusion

The judgment of the District Court is affirmed.

Copyright © 2003 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,
v.
HARRY SHUSTER,
Defendant-Appellant-Cross-Appellee.
02-1417L, 02-1487XAP
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT 7
2003 U.S. App. LEXIS 11545
June 10, 2003, Decided

NOTICE: [*1] RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of New York. (John Gleeson, Judge). *United States v. Shuster*, 2003 U.S. App. LEXIS 11504 (2d Cir. N.Y., June 10, 2003)

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed a judgment from the United States District Court for the Eastern District of New York, which sentenced him to 72 months' imprisonment following his conviction for securities fraud and money-laundering offenses. The Government cross-appealed to challenge one aspect of the sentence.

OVERVIEW: This order concerned defendant's contentions. The district court did not abuse its discretion under Fed. R. Evid. 403 in prohibiting defendant's cross-examination of a cooperating witness concerning the audiotaped statements the witness made to a third party. The district court did not err in denying defendant's motion to take the deposition of a witness who lived in the United Kingdom or in rejecting his claim that the Government improperly failed to assist him in obtaining that witness's live testimony at trial. The district court properly excluded the

affidavits of defendant's mother and the foreign witness, both of which suggested that defendant had merely managed funds on behalf of his parents. The district court also correctly rejected the claim that defendant's and the foreign witness's affidavits qualified under Fed. R. Evid. 804(b)(3) as statements against penal interest. The district court did not exceed its discretion in admitting evidence of defendant's prior bad acts with respect to the film transactions fraud. The district court did not err in calculating the "value" of the laundered funds under U.S. Sentencing Guidelines Manual § 2S1.1.

OUTCOME: The court affirmed defendant's conviction and sentence.

COUNSEL: APPEARING FOR APPELLANT: Jeremy Maltby, O'Melveny & Myers, LLP, New York, N.Y.

APPEARING FOR APPELLEE: Ronald G. White, Asst. U.S. Atty., Brooklyn, N.Y.

JUDGES: PRESENT: HONORABLE JON O. NEWMAN, HONORABLE ROSEMARY S. POOLER, HONORABLE ROBERT A. KATZMANN, Circuit Judges.

OPINION: SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is AFFIRMED.

Harry Shuster appeals from the July 12, 2002, judgment of the District Court for the Eastern District of New York (John Gleeson, District Judge) sentencing him principally to 72 months' imprisonment following his conviction for securities fraud and money-laundering offenses. The Government has cross-appealed to challenge one aspect of the sentence. On the cross-appeal, we have affirmed in an opinion filed this date. This summary order concerns Shuster's contentions on his appeal, all of [*2] which are rejected.

1. The District Court did not abuse its discretion under Fed. R. Evid. 403 in prohibiting Shuster's cross-examination of Jordan Belfort, the cooperating witness,

concerning the audiotaped statements Belfort made to Dennis Gaito. The Court noted that the circumstances under which the tapes were made - "the result of a deliberate deception at the government's instance of Gaito by Belfort" - were such that the conversation was full of lies by Belfort and thus would be likely to confuse and mislead the jury. Moreover, Shuster had ample opportunity to call Belfort's credibility into question using other evidence.

2. The District Court did not err in denying Shuster's motion to take the deposition of Montague Koppel or in rejecting his claim that the Government improperly failed to assist him in obtaining Koppel's live testimony at trial. Koppel, a close friend and business associate of Shuster's who lived in the United Kingdom, would allegedly have provided testimony undermining the Government's allegations that Shuster violated SEC provisions by using the corporation Plus One as a nominee when investing in South Africa. Judge Gleeson refused to conclude that Koppel [*3] was "unavailable" for the purposes of Fed. R. Crim. P. 15, citing Koppel's vacillation on the issue of whether he would travel to the United States to testify, his close relationship with Shuster, and his efforts to prevent the Government from obtaining documents "necessary to a meaningful cross-examination of him."

3. The District Court did not exceed its discretion in determining that Koppel's statements in the depositions of Stephen Screech and Walton Imrie did not qualify as statements against interest under Fed. R. Evid. 804(b)(3). Even if these statements might qualify as statements against penal interest, Judge Gleeson was entitled to conclude that the statements lacked requisite indications of reliability.

4. The District Court properly exercised its discretion in excluding the affidavits of Shuster's mother and Koppel, both of which suggested that Shuster had merely managed Plus One funds on behalf of his parents. In rejecting Mrs. Shuster's affidavit, the Court noted a double hearsay problem in that her knowledge was based on statements made to her

by others. The Court also correctly rejected the claim that Shuster's and Koppel's affidavits qualified under Fed. R. Evid. 804(b)(3) [*4] as statements against penal interest in light of the lack of "corroborating circumstances indicating the trustworthiness of these statements."

5. The Court did not exceed its discretion in admitting evidence of Shuster's prior bad acts with respect to the film transactions ("LHO") fraud. The LHO fraud evidence involved uncharged acts suggesting that Shuster had tricked LHO into providing money for a film production by claiming that financing was also being provided by a Swiss investor, when in fact Shuster had arranged with Imrie for Sonnenberg Anstalt, N.V., to act as Shuster's nominee and pose as the Swiss investor. This transaction was similar to the charged acts in which Shuster had used Plus One as his nominee to conduct illegal securities transactions. The similar acts evidence was probative of knowledge and intent, which Shuster had placed in issue.

6. The District Court did not err in calculating the "value" of the laundered funds under U.S.S.G. § 2S1.1 (1997). Shuster claims that the Court should have considered "only the illicit profits generated from [the fraudulent securities] transactions, and not untainted capital initially invested." Neither the plain [*5] language of the Guidelines provision nor its commentary supports this interpretation. HN1Rather than being synonymous with the word "profits," as Shuster seems to contend, "proceeds"--the term used in subsection 18 U.S.C. § 1956(a)(1)--means "the sum derived from a sale or other transaction," The American College Dictionary, 965 (Random House 1970), and thus clearly includes both the illegitimate funds and the legitimate money used to disguise them, see *United States v. Martin*, 320 F.3d 1223, 1225-27 (11th Cir. 2003). The Court also properly included various securities transactions as relevant conduct and did not engage in impermissible double counting.

7. The District Court properly applied a two-level enhancement under U.S.S.G. § 2F1.1(b)(3)(B) (1997)

because the offense involved a violation of an administrative order. Shuster contends that the enhancement applies only if the order was entered against the defendant himself. This argument overlooks the general guideline provision that HN2"specific offense characteristics . . . shall be determined on the basis of . . . all acts . . . aided, abetted, [or] counseled . . . by the defendant." [*6] *Id.* § 1B1.3(a)(1)(A). The order in question named Jordan Belfort, and the District Judge found that Belfort "along with others, including Shuster, decided to defy [the administrative order] and to commit very lucrative securities fraud notwithstanding it. They had to engage in some contortions in order to do that." The commentary to section 2F1.1(b)(3)(B), in describing the subsection's application to an order naming the defendant or an entity controlled by him, see *id.* § 2F1.1(b)(3)(B), comment. (n.5), could arguably be understood to limit the unrestricted wording of the enhancement provision. On the other hand, the commentary could also be read to broaden the enhancement provision: it could mean that when a company controlled by a defendant violates an administrative order entered against the company, the defendant is subject to the enhancement simply because he is aware of the order, even if he lacks the mens rea necessary for aider and abettor responsibility. In view of the ambiguity of the commentary, we decline to read it to alter the unrestricted scope of the enhancement provision itself, which refers to the "offense," and not to the "defendant," or to preclude [*7] application of section 1B1.3(a)(1)(A) making Shuster liable for conduct covered by section 2F1.1(b)(3)(B) that Shuster aided.

8. The District Court properly declined to group the securities offenses with the money-laundering offenses pursuant to the 1997 version of U.S.S.G. § 3D1.2. *Cf United States v. Szur*, 289 F.3d 200, 214-16 (2d Cir. 2002); *United States v. Sabbeth*, 277 F.3d 94, 96-99 (2d Cir 2002); *United States v. McCarthy*, 271 F.3d 387, 400-401 (2d Cir. 2001); *United States v. Sabbeth*, 262 F.3d 207, 220-21 (2d Cir.

2001), *reh'g denied*, 277 F.3d 94 (2d Cir. 2002); *United States v. Kalust*, 249 F.3d 106, 108-10 (2d Cir. 2001).

The Appellant's remaining contentions have been considered and rejected as lacking merit.

Copyright © 2003 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK ENTERED 7-12-02

ENTERED NOVEMBER 07, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
Holding Session in Brooklyn

JUDGEMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

UNITED STATES OF AMERICA,

v.

HARRY SHUSTER

Case Number: CR-99-482(GJ)
Assistant United States Attorney: Adam Schuman
Defendant's Attorney: Jay T. Karahan
Court Reporter: Mickey Brymer

The defendant Harry Shuster having been found guilty on all counts of seven count superseding indictment accordingly the defendant is ADJUDICED guilty of such Count(s), which include the following offenses:

Title & Section: 18 USC 371
Nature of Offense: conspiracy to commit securities fraud
Count Number(s): one
Title & Section: 15 USC 78j(h)
Nature of Offense: securities fraud
Count Number(s): two-six
Title & Section: 18 USC 1956(h)
Nature of Offense: conspiracy to commit money laundering
Count Number(s): seven

The defendant is sentenced as provided in pages 2 through 5 of the Judgement. The sentence is imposed pursuant to the Sentencing Reform Act of 1988.

X The defendant is advised of his/her right to appeal within ten (10) days.

The defendant has been found not guilty on count(s) and discharged as to such count(s)

X The underlying indictment is dismissed on the motion of the United States.

The mandatory special assessment is included in the portion of Judgement that imposes a fine.
X It is ordered that the defendant shall pay to the United States a special assessment of $700.00 which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid

Defendant's Social Security No.: 571-98-4386
Defendant's Date of Birth: 03/17/1935
Date of imposition of sentence: June 21, 2002
Defendant's USM No.: 57209-053
IN CUSTODY
Defendant's Mailing Address:
Signature of Judicial Officer
/SS/
Name and Title of Judicial Officer:
JOHN GLEESON
UNITED STATES DISTRICT JUDGE
Date: 7/11/2002

DEFENDANT: HARRY SHUSTER
CASE NUMBER: CR-99-482(GJ)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of: SIXTY (60) MONTHS ON COUNT 1; SEVENTY-TWO (72) MONTHS ON COUNTS 2, 3, 4, 5, 6 AND 7. THE SENTENCES ARE TO RUN CONCURRENTLY.

X The defendant is remanded to the custody of the United States Marshal.

X The Court recommends that the defendant be designated to Nellis Airforce Correctional Facility in Las Vegas, Nevada, if consistent with Bureau of Prison policy. I further recommend that he receive substance abuse treatment while incarcerated.

X The defendant shall surrender to the United States Marshal for this District.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

- 12:00 noon.
- As notified by the United States Marshal.
- As notified by the Probation Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____

United States Marshal

By:

_____

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: Three (3) years on each of counts 1-7 to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release , the defendant shall not commit another Federal, State, or Local crime and shall comply with the standard conditions that have been adopted by this Court (Seaforth on the following page).
The defendant is prohibited from possessing a firearm.
The defendant shall not illegally possess a controlled substance.
If this Judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

THE DEFENDANT IS TO COMPLY WITH THE ORDER OF FORFEITURE, A COPY OF WHICH IS ATTACHED AND INCORPORATED BY REFERENCE, DEFENDANT MUST MAKE FULL FINANCIAL DISCLOSURE AS DIRECTED BY THE PROBATION DEPARTMENT.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgement:
1) The defendant shall not leave the judicial district without the permission of the court or probation officer;
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or ether acceptable reasons;
6) The defendant shall notify the probation officer ten days prior to any change m residence or employment;
7) The defendant shall refrain from excessive use of alcohol and shall nor purchase, possess, use distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a Physician;
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a taw enforcement officer;
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification

CRIMINAL MONETARY PENALTIES

COUNT	FINE	RESTITUTION
1-7	$100,000.00	TO RUN CONCURRENTLY

THE FINE IS TO BE PAID SIX (6) MONTHS FROM TODAY

RESTITUTION

___ The determination of restitution is deferred under Chapters 109A, 110, 110A, and 113A of the Title 18 for offenses committed on or after 9/13/1998, until _____. an amended judgment in a criminal case will be entered after such determination.

___ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

TOTALS: _____

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of the Title 18 for offenses committed on or after September 13, 1998.

STATEMENT OF REASONS

X The Court adopts the factual findings and guideline application in the pre-sentence report.

The Court makes the following findings regarding the guidelines calculations:

GUIDELINE RANGE DETERMINATION BY THE COURT:

Total Offense Level: 31
Criminal History Category: 1
Imprisonment Range: 108-135 months.
Supervised Release Range: 2-3 years.
Fine Range: $15,000.00 to $40,674,208.00.
Restitution Range: $ to $

DEPARTURES FROM THE GUIDELINES RANGE

___ The sentence within the guideline range, that range DOES NOT EXCEED 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

___ The within the guideline range, that range EXCEEDS 24 months, and the sentence is imposed for the following reasons:

___ Upon motion of the government, as a result of defendant's substantial assistance.

X For the following specific reason(s): THE COURT DOWNWARD DEPARTS PURSUANT TO 5K2.0 OF THE GUIDELINES COMBINED EFFECT OR EXTRAORDINARY FAMILY CIRCUMSTANCES; CHARITABLE WORKS; AND AGE.

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DENYING PETITIONER SHUSTER'S REQUEST TO DEPOSE MONTAGUE KOPPEL IN LONDON, DATED 5-25-01 (Entered 6-11-01)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Entered:
06/11/2001

UNITED STATES OF AMERICA,

-against-

ORDER

HARRY SHUSTER,
Defendant.

99 CR 482 (JG)

JOHN GLEESON, United States District Judge:

The defendant has renewed a previously-withdrawn request for an order pursuant to Fed. R. Crim. P. 15 allowing him to take the deposition in London of Montague Koppel. The government opposes the application, and in the alternative seeks that any such order be conditioned on Koppel's production of documents the government has been seeking from him through a request pursuant to a mutual legal assistance treaty.

Rule 15(a)provides as follows: "Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may ... order that testimony of such witness be taken by deposition...." The "exceptional circumstances" requirement of Rule 15 is met "if [the] witness' testimony is material to the case and if the witness is unavailable to appear at trial." *United States v. Johnpoll*, 739 F.2d 702, 708 (2d Cir. 1984), *cert. denied.* 469 U.S. 1075 (1985). The burden is on the moving party to demonstrate both the materiality of the testimony and the unavailability of the witness. See *United States v. Whiting*, 308 F.2d 537, 541 (2d Cir. 1962), *cert. denied*, 372 U.S. 919 (1963). "Unavailability is to be determined according to the practical standard of whether under the circumstances the [party seeking to take the deposition] has made a good-faith

effort to produce the person to testify at trial." *Johnpoll*, 739 F.2d at 709 (citing *Ohio v. Roberts*, 448 U.S. 56, 74 (1979)).

In light of all the circumstances in the case, including the relationship between Koppel and the defendant, Koppel's vacillation on the question whether he will come to the United States voluntarily to testify at trial, and Koppel's efforts to prevent the government from obtaining the documents necessary to a meaningful cross examination of him, I conclude that the defendant has failed to establish that Koppel is unavailable for the purposes of Rule 15..

Accordingly, the motion is denied.

So Ordered.

JOHN GLEESON, U.S.D.J.

Dated:
Brooklyn, New York
May 25, 2001

APPENDIX D

SHUSTER OBJECTIONS TO REDACTION OF DEPOSITIONS DATED 7-13-01

O'MELVENY & MYERS LLP

LOS ANGELES Citicorp Center HONG KONG
CENTURY CITY 153 East 53rd Street LONDON
New York, New York 10022-4611
NEWPORT BEACH SHANGHAI
SAN FRANCISCO TOKYO
WASHINGTON, D.C.
TELEPHONE: (212)320-2000
FACSIMILE: (212)326-2061
INTERNET:www.omm.com

OUR FILE NUMBER
789,559-001

July 13, 2001

WRITER'S DIRECT DIAL
212-326-2276
WRITER'S E-MAIL ADDRESS
acohen@omm.com

BY HAND DELIVERY

Honorable John Gleeson
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Harry Shuster 99 CR 482 (JG)

Dear Judge Gleeson:

As you know, we represent Harry Shuster, the defendant in the above-captioned case. We write to present our objections to the government's proposed redaction of the transcript of the deposition of Walton Imrie Our objections fall into three basic categories: (1) testimony excluded by the Court's original ruling on the Koppel hearsay; (2) specific objections to the government's redactions implementing the court's ruling, and (3) redactions based on Mr. Shuster's

objections to the government's questions. The defense has forgone most of the objections made on the record, We have highlighted the three categories in different colors on a photocopy of the transcript that contains the government's proposed. redaction. The government's redactions are in black; the defense objections in category 1 are in orange, in category 2 in yellow, and in category 3 in pink. Where the objection falls in two categories, both colors have been used.

1. Koppel Statements

First, we have highlighted in orange testimony directly affected by the Court's initial ruling concerning Imrie's testimony that Montague Koppel ("Koppel") told him that certain funds belonged to Morris Shuster and to Koppel. We wish to preserve and renew our objection to the exclusion of this testimony. In light of the government's opening statement, testimony elicited from Jordan Belfort, and the government's cross-examination of Imrie, this testimony is plainly admissible for the non-hearsay purpose of showing the state of mind of Koppel and Imrie. The government has argued that Imrie and Koppel both participated in a

conspiracy to conceal Harry Shuster's identity from the United States authorities. Belfort testified to this effect, and introduced hearsay statements from Mr. Koppel suggesting that he was aware of a scheme to conceal Harry Shuster's ownership of the subject funds. In a portion of the transcript that it has not sought to redact, the government cross-examined Imrie by suggesting that he knowingly concealed from the SEC and U.S. investors the fact that Harry Shuster was the owner of Plus One Finance Limited ("Plus One'). Imrie's testimony about what Koppel told him demonstrates that neither Koppel nor Imrie believed that the relevant funds

belonged to Mr. Shuster, and that they therefore had an innocent state of mind. Having claimed that Koppel and Imrie knowingly assisted Harry Shuster in concealing his ownership of the funds by filing false forms with the SEC concealing Harry Shuster's ownership of Plus One, the government has placed Imrie's and Koppel's state of mind squarely at issue. *See U.S. v. Esquivez,* 755 F. Supp. 434, 440 (D.D.C. 1990) (government puts defendant's flight and fugitivity into evidence opening the door to the introduction of evidence of other defendants' acquittals to prove his state of mind), The government should not be permitted to prevent the jury from hearing evidence that shows an innocent state of mind. It is patently unfair to allow the government to cross-examine Imrie by suggesting that he is concealing Harry Shuster's identity, when Imrie believed that the funds belonged to Harry Shuster's South African parents. *See* Imrie Dep. 260-33 1.

Second, the Imrie's testimony about the Koppel statement's should also be admitted so that the jury is not left with a misleading impression of his overall testimony. As redacted by the government, the testimony now suggests that Imrie testified that he received the money for Harry Shuster and took instructions from Shuster without any reference to the witness' understanding of whose funds he was holding. As a reading of the entire testimony makes abundantly clear, the redactions now thoroughly distort the thrust of his testimony. Similarly, the exclusion of the testimony of what Mr. Koppel told Mr. Imrie makes it appear as if Mr. Koppel was assisting Mr. Shuster in hiding his funds in Switzerland with Kestrel. The testimony of Mr. Imrie is to the contrary, but the redaction prohibits the jury from learning that fact. Mr. Imrie understood that he was handling Shuster's parents' money, and Mr. Koppel's role as the guardian of that money is critical to understanding the neither man was acting improperly. The government's redaction distorts Mr. Imrie's statements to advance the government's case, and is a plain violates the rule of completeness. Fed.R.Evid. 106. Indeed,

some of the testimony seeks to eliminate was elicited by the government on its cross-examination on the witness. *See, e.g.*, Imrie Deposition 326-327 (....As I told you before, I was told it was the late Mrs. Shuster...")

Finally, much of the remaining questioning of Mr. Imrie focuses on his South African clients. At one point, he states that he has only three U.S. clients. That statement is true because the Plus One account was on behalf of Shuster's South African parents. Absent the testimony that Imrie believed that the account was on behalf of a South African family, the jury, however, will be led to believe that Harry Shuster was one of those three individuals, which he was not. In fact, in light of the exclusion of the testimony of Mr. Imrie regarding his

understanding of the ownership of the account, the jury may well conclude that Imrie was misled by Shuster into believing that he was still living in South Africa.

2. Rule 404(b) Objections

Consistent with our Mr. Shuster's prior objection to the introduction of any testimony or document relating to the Louis Horowitz and Robert Evans Company transaction with Sonnenburg, we object to the admission into evidence of that testimony. *See* Imrie Dep. 339-409. Should the Court admit that testimony, we have highlighted our specific objections in the text.

3. Questions Regarding Willingness to Attend Trial

We believe that the Court should exclude the cross-examination of Mr. Imrie regarding his unwillingness to testify as a witness at trial. As the Court knows - but the jury

will not - a witness living in a foreign country has no obligation whatsoever to attend a trial in the U.S. It is misleading for the government to suggest that Mr. Imrie is biased either because he declined to attend or refused to meet with the government before his deposition. The testimony is irrelevant; if relevant, its probative value is substantial outweighed by it prejudicial impact.

For the foregoing reasons, we respectfully request that the court deny the government's requests to exclude the relevant portions of the Screech and Imrie depositions and to order the blanket admission of the Kestrel binders. The testimony should be admitted for proper non-hearsay purpose to show the state of mind and understanding of Imrie and Koppel, with an appropriate limiting instruction. Alternatively, the Court should exclude the Imrie testimony in its entirety.

Thank you very much for your consideration of this matter. Please feel free to contact me at your convenience if you have any questions. The marked up binders are being sent by hand to chambers and to the government.

Respectfully submitted,

Alan M. Cohen
of OVELVENY & MYERS LLP

cc: Adam H. Schuman, Esq.
NY1:816578.1

APPENDIX E

CONSENT ORDER OF FORFEITURE
DATED 7-3-02

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Entered
7-3-02

UNITED STATES OF AMERICA,
v.
HARRY SHUSTER,
Defendant

CONSENT ORDER OF FORFEITURE
No. 99-CR-0482 (S-2)(GJ)
(Gleeson, J.)

WHEREAS, in the forfeiture allegation of the above-captioned superseding indictment, the United States of America gave notice of its intent to seek forfeiture, pursuant to 18 U.S.C. § 982(a)(1), of the following property: (a) all right, title, and interest which. the defendant Harry Shuster ("Defendant") may have in any and all property which was involved in the conspiracy to commit money laundering charged in Count 7 of the superseding indictment, and all property traceable to such property, including, but not limited to, all commissions, fees, and other property obtained as a result of said violations, all money or other property that was the subject of any financial transaction that Defendant conspired to conduct, and all property used in any manner or to any extent to commit or to facilitate the commission of said violations; (b) a sum of money equal to the total amount of money Defendant conspired to launder; and (c) all property subject to forfeiture as property traceable to property involved in the money laundering offense, including, but not limited to, the funds maintained at Swiss Bank Corporation, Neuchatel, Switzerland: account number FO-153'947, and any and all other funds maintained by or on behalf of Plus One Finance; and

WHEREAS, on August 1, 2001, Defendant was tried and convicted by a federal jury in this District of Count 7 of the superseding indictment, charging conspiracy to commit money laundering in violation of 18 U.S.C. §§ 1956(h); and

WHEREAS, on September 17,2001, this Court entered a Post Conviction Restraining Order ("Restraining Order"), which ordered that Defendant, any financial institutions at which he maintains accounts, keeps money, or possesses other interests, and any person and/or entity acting on his behalf or in concert with any of the foregoing persons, institutions or entities shall not, directly or indirectly, transfer, sell, assign, pledge, hypothecate, encumber, or dispose of in any manner; cause to be transferred, sold. assigned, pledged, hypothecated, encumbered, disposed of in any manner; or take, or cause to be taken, any action that would have the effect of depreciating, damaging, or in any way diminishing the value, property, or other interest belonging to or owed to the defendant, individually or through any corporation in which he has a controlling interest; and

WHEREAS, Defendant has waived his right to have the jury which convicted him determine the forfeiture allegation of the superseding indictment; and

WHEREAS, in light of his aforementioned conviction and pursuant to 18 U.S.C. § 982(a)(1), Defendant now CONSENTS to the entry of a criminal forfeiture money judgement against him m the amount of $6,000,000.00 in United States currency, subject to the terms and conditions specified below, in lieu of an order of restitution imposed pursuant to 18 U.S.C. § 3664; and

WHEREAS, the United States agrees that it shall not pursue civil or criminal forfeiture against Defendant or against any of his property, other than the Forfeited Property expressly described in this Consent Order of Forfeiture; and

WHEREAS, as a result of Defendant's aforementioned conviction on Count 7 of the superseding indictment Defendant and the United States now desire to

resolve the forfeiture allegation of the superseding indictment in its entirety -

IT IS NOW, HEREBY, ORDERED, ADJIJDGED, AND DECREED, on consent of all parties hereto, as follows:

1. Pursuant to 18 U.S.C. § 982(a)(1), Defendant shall forfeit to the United States the sum of $6,000,000.00 in United States currency ("the Forfeited Property"), and this Court hereby enters judgement in favor of the United States in said sum ("the Forfeiture Judgement").

2. Defendant and his wife, Mrs. Nita Shuster, hereby withdraw and waive any objections they have previously flied with the Court to the entry of a criminal forfeiture money judgement against Defendant as well as any oppositions they have filed to motions filed by the government seeking entry of such a judgment. Defendant and his wife hereby expressly consent to the entry of a criminal forfeiture money judgement against Defendant as set forth in this Consent Order.

3. Defendant shall pay at least $500,000.00 in United States currency towards the Forfeiture Judgment by no later than December 31, 2002.

4. Defendant shall pay at least an additional $1,500,000.00 m United States currency towards the Forfeiture Judgment by no later than December 31, 2003.

5. Defendant shall pay at least an additional $2,000,000.00 in United States currency towards the Forfeiture Judgment by no later than June 30, 2005.

6. Except as it may be accelerated or otherwise modified as provided in this Consent Order of Forfeiture, the "Due Date" is June 30, 2007. Defendant shall pay the entire outstanding balance of the Forfeiture Judgment by no later than the Due Date.

7. No later than fifteen business days prior to any of the dates set forth in paragraphs 3 through 6 above, Defendant may request an extension of the date for good cause. Such requests must be submitted in writing to

Assistant United Stales Attorney F. Franklin Amanat, must request an extension to a date certain not to exceed ninety days following the date in question, and must set forth in detail the reasons supporting the extension, including a description of all efforts Defendant is then undertaking to comply timely and in good faith with his obligations under this Consent Order of Forfeiture. The government shall act on the request timely and in good faith, and if it grants the requested extension, it shall communicate to that effect in writing to Defendant, and the extension need not be so-ordered by the Court. If the government denies file requested extension, then the date specified above shall continue to apply. The government's decision to grant or deny a requested extension shall not be subject to review by this or any other Court.

8. Defendant's obligation to pay the entire Forfeiture Judgment shall be secured as follows:

a. As used in this Consent Order, the "Security Provision Date" shall be June __, 2002, or three business days prior to the date of Defendant's sentencing, whichever is earlier.

b. i. By no later than the Security Provision Date, Defendant and .his wife, Mrs. Nita Shuster, shall jointly execute and shall submit to the United States a notarized promissory note and deed of trust, in a form ready to be recorded with the appropriate county authority, which shall grant the United States a lien as to the following property: the lot or parcel of land, together with its buildings. appurtenances, improvements, fixtures, attachments, and easements, located at 1501 Champion Hills Lane, Las Vegas, NV 89134-0598, described in the land records of Clark County, Nevada, as Lot 55 in Block B of Tournament Hills - Unit 1, as shown by map thereof in Book 50 of Plats, Page 34, in the Office of the County Recorder of Clark County, Nevada. This property shall hereinafter be referred to as the "Champion Hills Property."

ii. By singing this Consent Order of Forfeiture, Mrs. Nita Shuster agrees that she will cooperate timely and fully with the United States in providing the security specified in this paragraph, that she agrees to encumber her interest in the Champion Hills Property as specified in this paragraph, and that she will timely execute, jointly with her husband, the deed of trust specified in this paragraph.

c. i. By no later than the Security Provision Date, the corporation known as 1990 Westwood Blvd., Inc., shall submit to the United States a notarized promissory note and deed of trust, in a form ready to be recorded with the appropriate county authority, and signed by at least two officers or employees of the corporation with legal authority to sell or encumber real property owned by the corporation. Said promissory note and deed of trust shall grant the United States a lien as to that lot or parcel of land, together with its buildings, appurtenances, improvements, fixtures, attachments, and easements, located at 1990 Westwood Blvd., Los Angeles, CA,. 90025, and legally described as Lots 10, 11, and 12 in Block 52 of Tract 5609 in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 65, Pages 72 and 73 of Maps, in the Office of the County Recorder of said county (assessor parcel no. 4321-011-085). This property shall hereinafter be referred to as the "Westwood Property."

ii. By no later than the close of business on the third business day following the entry, of this Consent Order of Forfeiture, the corporation known as 1990 Westwood Blvd., Inc., shall submit to the United States a notarized corporate resolution, prepared and executed in accordance with the requirements of the relevant state law, signed by the each and every officer, director, and shareholder of 1990 Westwood Blvd., Inc., attested to by the corporate secretary of 1990 Westwood Blvd., Inc., and affixing the corporate seal, if available. Said resolution shall identify the persons who will sign the ptomissory note and

deed of trust specified in paragraph 8(c)(i) on behalf of the corporation, certify that said individuals are officers or employees of the corporation with legal authority to sell or encumber real property owned by the corporation, and set forth the consent of the corporation, and of each of its officers, directors, and shareholders, to encumber the Westwood Property in the manner set forth herein. To this corporate resolution shall be affixed the certificate of incorporation of 1990 Westwood Blvd.. Inc., and all documentation necessary to show that the persons signing and attesting the resolution constitute each and every officer, director, and shareholder of the corporation.

iii. Defendant and his wife, Mrs. Nita Shuster, will each cooperate timely and fully with the United States in obtaining the security specified in this paragraph 8(c). They both agree to vote all of their respective shares in 1990 Westwood Blvd., Inc., in favor of the corporate resolution described in paragraph 8(c)(ii) above and to prevail upon all of the other shareholders of said corporation to also vote in favor of the resolution and to approve the specified encumbrance.

d. i. By no later than the Security Provision Date, the corporation known as Shanalee Plaza, Inc., formerly known as SBP Property Investments, Inc., shall submit to the United States a notarized promissory note and deed of trust, in a form ready to be recorded with the appropriate county authority, and signed by at least two officers or employees of the corporation with legal authority to sell or encumber real property owned by the corporation. Said promissory note and deed of trust shall grant the United States a lien as to that lot or parcel pf land, together with its buildings, appurtenances, improvements, fixtures, attachments, and casements, located at southeast comer of Sunset Road and Whitney Ranch Drive in the City of Henderson, Clark County, Nevada 89014, commercially known as the Shanalee Plaza Shopping Center, and legally described in the land records of Clark County, Nevada, as set

forth on the attached Schedule A. This property shall hereinafter be referred to as the "Shanalee Property."

ii. By no later than the close of business on the third business day following the entry of this Consent Order of Forfeiture, the corporation known as Shanalee Plaza, Inc., shall submit to the United States a notarized corporate resolution, prepared and executed in accordance with the requirements of the relevant state law, signed by each and every officer, director, and shareholder of Shanalee Plaza, Inc., attested to by the corporate secretary of Shanalee Plaza, Inc., and affixing the corporate seal. Said resolution shall identify the persons who will sign the promissory note and deed of trust specified m paragraph 8(d)(i) on behalf of the corporation, certify that said individuals are officers or employees of the corporation with legal authority to sell or encumber real property owned by the corporation, and set forth the consent of the corporation, and of each of its officers, d/rectors, and shareholders, to encumber the Shanalce Property m the manner set forth herein. To this corporate resolution shall be affixed the certificate of incorporation of Shanalee Plaza, Inc., and all documentation necessary to show that the persons signing and attesting the resolution constitute each and every officer, director, and shareholder of the corporation.

iii. Defendant and his wife, Mrs. Nita Shuster, will each cooperate timely and fully with the United States in obtaining the security specified in this paragraph 8(d). They both agree to vote all of their respective shares in Shanalee Plaza, Inc., in favor of the corporate resolution described in paragraph 8(d)(ii) above and to prevail upon all of the other shareholders of said corporation to also vote in favor of the resolution and to approve the specified encumbrance.

9. If and only if ail of the security called for in paragraph 8 is provided to the United

States in the mariner and within the tames specified in paragraph 8, then the United States shall, within twenty days after receiving said security, certify its receipt of the security to the Court in writing and apply to the Court for a vacatur of the Restraining Order. Upon receiving said certification and application from the government, this Court shall forthwith vacate the Restraining Order.

10. If the security called for in paragraph 8 is not provided to the United States m the mariner and within the time specified in paragraph 8, then (i) the Restraining Order (as modified by the Stipulation and Order entered by the Court on May 23, 2002, relating to the release of certain restrained funds) shall remain in full force and effect; (ii) this Consent Order of Forfeiture shall be vacated and become null and void; (iii) the government shall have the right to request that the Court enter an order of forfeiture, an order of restitution, and/or an order providing for any other sanctions, fines, penalties, interest, and assessments allowable by law, and said fight shall not be limited to the amount of the Forfeiture Judgment set forth in this Consent Order; and (iv) the government shall have the right to request an adjournment of the sentencing date to which request the Defendant shall not have the right to object.

11. On tine first occasion in which Defendant defaults by failing to make; in fall, any payment required by paragraphs 3 through 5 above, by the deadline set forth in the paragraph in question:

a. The United States, may, in its sole discretion, and at any time after said default, take possession and custody of, and/or foreclose upon its lien on, the Champion Hills Property.

b. The entire proceeds from the government's disposition of the Champion Hills Property, (i) after payment of all attorneys' fees, costs, and expenses incurred in connection with the disposition, and (ii) after satisfaction of all reasonable and legitimate prior liens on the property, including, hat not limited to, prior deeds of trust as

well as prior liens for taxes owed by Defendant, shall be credited towards the Forfeiture Judgment, and this shall be true even if said net proceeds exceed the amount of the specific payment as to which Defendant defaulted, with the excess amount to be applied towards Defendants' subsequent payments under this Consent Order of Forfeiture.

c. If the portion of the proceeds of the disposition of the Champion Hills Property which is credited towards the Forfeiture Judgment in accordance with the preceding subparagraph is less than the amount of the specific payment as to which Defendant defaulted, or if the Champion Hills Property no longer secures the Forfeiture Judgment as of the time of the defaulted payment, Defendant shall have the opportunity to satisfy any shortfall from other funds available to him. If Defendant does not do so within 30 days, then the United States, may, in its sole discretion, and at any time after said default, take possession and custody of, and/or foreclose upon its lien on, the Westwood Property.

d. The entire proceeds from the government's disposition of the Westwood Property., (i) after payment of all attorneys' fees, costs, and expenses incurred in connection with the disposition, and (ii) after satisfaction of all reasonable and legitimate prior liens on the property, including, but not limited to, prior deeds of trust as well as prior liens for taxes owed by Defendant, shall be credited towards the Forfeiture Judgment, and this shall be true even if said net proceeds exceed the amount of the specific payment as to which Defendant defaulted, with the excess amount to be applied towards Defendants' subsequent payments under this Consent Order of Forfeiture.

e. If the portion of the proceeds of the disposition of the Champion Hills and Westwood Properties which is credited towards the Forfeiture Judgment in accordance with subparagraphs (b) and (d) above is less than the amount of the specific payment as to which Defendant defaulted, or if the Champion Hills and Westwood Properties no longer secure the Forfeiture Judgment as of the time of the

defaulted payment, Defendant shall have the opportunity to satisfy any shortfall from other funds available to him. If Defendant does not do so within 30 days, then the United States, may, in its sole discretion, and at anytime after said default, take possession and custody of, and/or foreclose upon its lien on, the Shanalee Property.

f. The entire proceeds from the government's disposition of the Shanalee Property, (i) after payment of all attorneys' fees, costs, and expenses incurred in connection with the disposition, and (ii) alter satisfaction of all reasonable and legitimate prior liens on the property, including, but not limited to, prior deeds of trust as well as prior liens for taxes owed by Defendant, shall be credited towards the Forfeiture Judgement, and this shall be true even if said net proceeds exceed the amount of the specific payment as to which Defendant defaulted, with the excess amount to be applied towards Defendants' subsequent payments under this Consent Order of Forfeiture.

12. On the second or subsequent occasion in which Defendant defaults by failing to make, in full, any payment required by paragraphs 3 through 5 above, by the deadline set forth in the paragraph in question, the Due Date by which the entire outstanding balance of the Forfeiture Judgment must be paid shall be accelerated to thirty days following the date on which the payment in question was to have been made.

13. In the event that Defendant fails to pay the entire outstanding balance of the Forfeiture Judgment by the Due Date, interest will accrue on any unpaid balance of the Forfeiture Judgment, at the judgment rate of interest applicable under 18 U.S.C. § 3612, commencing on the Due Date. Interest shall not accrue prior to the Due Date.

14. In the event that the Forfeiture Judgement is not paid and satisfied in full on or before the Due Date, the United States, may, in its sole discretion, and at any time after the Due Date, take possession and custody of, and/or foreclose upon its liens on, any or all of the assets identified

in paragraph 8 above, to the extent necessary to satisfy the Forfeiture Judgment. The entire proceeds from the disposition of any property disposed of by the United States pursuant to this paragraph, (a) after payment of all attorney's' fees, costs, and expenses incurred in connection with the disposition, and (b) after satisfaction of all reasonable and legitimate prior liens on the property, including, but not limited to, prior deeds of trust as well as prior liens for taxes owed by Defendant, shall be credited towards the Forfeiture Judgement, inclusive of any accrued interest.

15. In the event that (a) the Forfeiture Judgement is not paid and satisfied in full on or before the Due Date, and (b) the portion of the proceeds from the disposition of property which is credited towards the Forfeiture Judgment pursuant to paragraphs 11 and/or 14 above is insufficient to pay and satisfy the entire remaining balance of the Forfeiture Judgment, inclusive of interest, then the United States, may, in its sole discretion, and at any time after the Due Date, take any measures available to it as a matter of law for the collection of an unsecured debt, including, but not limited to, the measures available under FED. R. CIV. P. 69(a) and the Federal Debt Collection Procedures Act, 28 U.S.C. §§ 3001-3015. Notwithstanding the foregoing sentence, the United States waives all rights it may bare under 18 U.S.C. § 982 and 21 U.S.C. § 853, including but not limited to rights to proceed under those statutes against substitute assets belonging to Defendant, except as expressly set forth in this Consent Order.

16. a. Defendant agrees that until the Forfeiture Judgement is fully satisfied, he shall not, directly or indirectly, engage in any effort to transfer, sell, assign, pledge, hypothecate, encumber, or dispose of in any manner, or cause to be transferred, sold, assigned, pledged, hypothecated, encumbered, or disposed of in any manner (collectively "convey") any of the properties identified in paragraph 8 above, u4thout the express written approval of

the United States, which will be not be unreasonably withheld.

b. Likewise, Defendant's wife, Mrs. Nita Shuster, agrees that until the Forfeiture Judgement is fully satisfied, she shall not, directly or indirectly, engage in any effort to convey the Champion Hills Property without the express written approval of the United States, which will be not be unreasonably withheld.

c. In addition, in the promissory note and deed of trust called for by paragraph 8(c)(i) above, the corporation known as] 990 Westwood Blvd., Inc. shall certify and agree that until the Forfeiture Judgment is fully satisfied, it shall not, directly or indirectly, engage in any effort to convey the Westwood Property, without the express written approval of the United States, which will be not be unreasonably withheld.

d. In addition, in the promissory note and deed of trust called for by paragraph 8(d)(i) above, the corporation known as Shanalee Plaza, Inc. shall certify and agree that until the Forfeiture Judgment is fully satisfied, it shall not, directly or indirectly, engage in any effort to convey the Shanalee Property, without the express written approval of the United States, which will be not be unreasonably withheld.

e. (i) The United States shall have the right to veto any and all aspects of any proposed conveyance of any of the properties specified m paragraph 8 above, including, but not limited to, the right to veto proposed purchasers, sources of financing, and terms and conditions of sale. The United States shall not exercise this veto right unreasonably.

(ii) Defendant and his wife, Mrs. Nita Shuster, both agree to provide to Assistant United States Attorney F. Franklin Amanat at least ten business days' advance written notice of any and all proposed conveyances of the Champion Hills Property; likewise, in the promissory notes and deeds of trust called for by paragraphs 8(c)(i) and

8(d)(i) above, 1990 Westwood Blvd., Inc. and Shanalee Plaza, Inc., shall certify and agree to provide to Assistant United States Attorney F. Franklin Amanat at least ten business days' advance written notice of any and all proposed conveyances of the Westwood Property, or the Shanalee Property, respectively.

(iii) Without limiting the rights of the United States under subparagraph 16(e)(i) above, any proposal to sell any of the properties specified in paragraph 8 above will be rejected unless (A) the sale transaction is arranged so that *all* proceeds from the sale of the property, after payment of all reasonable and legitimate attorneys' fees, costs, and expenses incurred in connection with the sale, and after satisfaction of all reasonable and legitimate prior liens on the property, including, but not limned to, prior deeds of trust as well as prior liens for taxes owed by Defendant, are remitted by the escrow intermediary directly to the United States (in the manner specified in paragraph 20 below), to be credited towards the Forfeiture Judgment, and (B) *all* said proceeds are remitted to the United States on or about the date of closing, irrespective of any deadlines or payment amounts which may be called for under paragraphs 3 through 6 above, with any amount in excess of payments then due and owing to be applied towards Defendants' subsequent payments under this Consent Order of Forfeiture.

f. Until the Forfeiture Judgment is fully satisfied, any conveyances of any of the said properties which do not comply with the terms of this paragraph shall be deemed fraudulent, null, void, and of no legal effect.

g. (i) At any time prior to one year before the Due Date, Defendant may request, in writing, that the United States reduce the amount of property which secures Defendant's obligation to pay the Forfeiture Judgement pursuant to paragraph 8, on the grounds that the Forfeiture Judgment is substantially over-secured and that one or more of the liens specified in paragraph 8, or a portion thereof, is neither necessary, nor even potentially necessary

to secure Defendant's obligation to pay the remaining balance of the Forfeiture Judgment.

(ii) Any such request must specify whether Defendant wants the United States (A) to vacate and release in its entirety one of the liens provided to the United States pursuant to paragraph 8, or (B) to allow Defendant to use a portion of the unencumbered equity in one of the properties described in paragraph 8 (i.e., unencumbered except as to the liens provided to the United States pursuant to paragraph 8) as collateral for purposes of borrowing a specified sum of money from a third-party lender, by subordinating the lien of the United States to the lien of said lender.

(iii) Such a request must annex documents and other proof, which shall include but not be limited to certified professional appraisals of all of the properties described in paragraph 8 which at the time of the request continue to secure the Defendant's obligation to pay the Forfeiture Judgement, said appraisals to be conducted at Defendant's sole expense by certified appraisers satisfactory to the United States.

(iv) Said annexed documents and proof must be sufficient to establish to the satisfaction of the United States that (A) the total value of the unencumbered equity in said properties (i.e., unencumbered except as to the liens provided to the United States pursuant to paragraph 8 above) as of the time of the request is greater than 105% of {he total remaining balance of the Forfeiture Judgment, or $2,000,000, whichever is greater, and (B) the lien in question, or portion, thereof, is neither necessary nor even potentially necessary to secure Defender's obligation to pay the remaining balance of' the Forfeiture Judgement. Alternatively, said annexed documents and proof must be sufficient to establish to the satisfaction of the United States that (A) the total value of the unencumbered equity in said properties (i.e., unencumbered except as to the liens provided to the United States pursuant to paragraph 8 above) as of the

time of the request is less than $2,000,000 but greater than 150% of the total remaining balance of the Forfeiture Judgement, and (B) the lien in question, or portion thereof, is neither necessary nor even potentially necessary to secure Defendant's obligation to pay the remaining balance of the Forfeiture Judgment.

(v) Upon receiving said request and said annexed documents and other proof., the United States shall have sixty days to verify the information contained therein. If and only if the United States is satisfied that the conditions specified in this subparagraph 16(g) have been met, then the United States shall, within ninety days after receiving said request and said annexed documents and other proof, allow Defendant to reduce the property which secures Defendant's obligation to pay the Forfeiture Judgment to property having unencumbered equity {i.e., unencumbered except as to the liens provided to the United Stales pursuant to paragraph 8 above) equal to the lesser of (A) 105% of the total remaining balance of the Forfeiture Judgment, or $2,000,000, whichever is greater, or (B) 150% of the total remaining balance of the Forfeiture Judgement.

(vi) Such a reduction in security, if any, shall be accomplished by the United States (A) agreeing in writing to vacate and release one of the liens provided to the United States pursuant to paragraph 8 in its entirety, or (B) following Defendant in writing to use a portion of the unencumbered equity in one of the properties described in paragraph 8 (i.e., unencumbered except as to the liens provided to the United States pursuant to paragraph 8) as collateral for purposes of borrowing a specified sum of money from a third-party lender, by subordinating the lien of the United States to the lien of said lender. The choice between (A) and (B), and the determination as to which property specified in paragraph 8 shall be affected by that choice, shall be entirely up to the United States, m its sole discretion and without regard to the terms of thc request made by Defendant pursuant m subparagraph 16(g)(ii) above.

In no event shall any action taken by the United States pursuant to subparagraph 16(g)(vi) or pursuant to subparagraph 16(g)(v) result in reducing the property, which secures Defendant's obligation to pay the Forfeiture Judgment to property having unencumbered equity (i.e., unencumbered except as to the deeds of trust provided to the United States pursuant to paragraph 8 above) equal to the lesser of (I) 105% of the total remaining balance of the Forfeiture Judgment, or $2,000,000, whichever is greater, or (II) 150% of the total remaining balance of the Forfeiture Judgment.

(vii) In the event that the United States grants, in whole or in part, a request from Defendant pursuant to this subparagraph 16(g), Defendant and his agents shall be solely responsible to arrange for the drafting, signing, filing, and recording of all legal documents (e.g., satisfactions of mortgage) necessary to effect the reduction of property which secures Defendant's obligation to pay the Forfeiture Judgement, except that the government must be given opportunity to review all such legal documents before they are filed, and no such documents may be filed or recorded without the governments' advance approval and consent in writing. Defendant shall be solely responsible for all filing fees, recordation costs, taxes, or other expenses which may accrue as the result of reducing the property which secures Defendant's obligation to pay the Forfeiture Judgment, in the manner provided in this subparagraph 16(g). Defendant shall also be liable to reimburse the government for any attorneys' fees, expenses, or costs which it may incur in connection with its evaluation, granting, or implementation of any request from Defendant pursuant to this subparagraph 15(g). Defendant shall not obtain credit towards the Forfeiture Judgment for any funds expended to comply with any aspect of this subparagraph 16(g).

17 a. Defendant and his wife, Mrs. Nita Shuster, each agree that until the Forfeiture Judgement is fully satisfied, they shall each ensure that all expenses

BEST AVAILABLE COPY

associated with the Champion Hills Property shall be paid and kept current; these expenses shall include, but shall not be limited to, the following: all real property taxes, mortgage liens, real and personal property insurance, liability insurance, fire insurance, utility charges, and any condominium or cooperative association fees.

b. Likewise, in the promissory notes and deeds of trust called for by paragraphs 8(c)(i) and B(d)(i) above, !990 Westwood Blvd., Inc. and Shanelee Plaza, Inc., shall certify and agree that until the Forfeiture Judgment is fully satisfied, they shall each ensure that all exposes associated with the Westwood Property and the Shanalee Property, respectively, shall be paid and kept current; these expenses shall include, but shall not be limited to, the following: all real property taxes, mortgage liens, real and personal property insurance, liability insurance, fire insurance, and utility, charges.

c. Defendant shall not obtain credit towards the Forfeiture Judgment for any' funds expended by any individual or entity to comply with parts (a) or (b) of this paragraph.

18. If the United States believes that there has been a material breach of any portion of paragraphs 16(a)-(d) or 17 above, whether such breach is by Defendant, Defendant's wife, 1990 Westwood Blvd., Inc., or Shanalee Plaza, Inc., or by any of their respective agents, heirs, or assigns, the government shall provide notice to Defendant in writing of its belief, setting forth the circumstances that it believes constitute the material breach. Defendant shall have sixty calendar days to cure, to the complete satisfaction of the government, any breach of which he has been thus notified, whether such breach is by Defendant, Defendant's wife, 1990 Westwood Blvd., Inc., or Shanalee Plaza, Inc., or by any of their respective agents, heirs, or assigns. If Defendant fails to cure the breach within this sixty day time period, to the complete satisfaction of the government, then the Due Date by which the entire outstanding balance of the

Forfeiture Judgment must be paid shall be accelerated to the thirtieth day, following the expiration of the sixty-day time period for curing the material breach.

19. Upon the entry of this Order, and at any time until the Forfeiture Judgment is satisfied in full, the United States Marshals Service and its agents, representatives, and contractors shall have the right, on reasonable notice (which shall be defined as at least two business days' notice), to enter upon and inspect any property listed in paragraph 8 above, whether to conduct an appraisal of such property, or to monitor and ensure compliance with the tarns of this Consent Order.

20. Unless otherwise instructed in a future written communication from the government to Defendant, all payments made by Defendant towards the Forfeiture Judgment shall be made by electronic wire transfer to the ac, count of the United States Marshals Service, ABA number 021030004 and ALC number 00008152, at the Federal Reserve Bank, 33 Liberty Street, New York, NY, with written confirmation of such transfer sent by fax to Assistant U.S. Attorney F. Franklin Amanat, United States Attorney's Office, One Pierrepont Plaza, 16th Floor, Brooklyn, NY 11201, fax number (718) 254-8702, and to Linda Rudolph, Property Management Specialist, United States Marshals Service, 225 Cadman Plaza East, Brooklyn, NY 11201, fax number (718) 254-6720.

21. The United States agrees that it shall not pursue civil or criminal forfeiture against Defendant or against any of his property, other than the Forfeited Property expressly described in this Consent Order of Forfeiture. Likewise, the United States agrees that, except as expressly set forth in this Consent Order, it shall not pursue civil forfeiture against any interests in property belonging to Mrs. Nita Shuster, to Shanalee Plaza Inc., or to 1990 Westwood, Inc., on the basis of the crimes for which Defendant was convicted.

22. The entry of this Consent Order of Forfeiture shall not affect the Court's ability to impose any other aspect of Defendant's sentence, including, without limitation, a fine or special assessment. The United States agrees to take no position at sentencing regarding what fine the Court should impose upon the Defendant.

23. Defendant shall seek no stay of enforcement of this Consent Order, or otherwise assert any objection to this Consent Order, based upon any term of incarceration imposed by the Court as part of his sentence, and Defendant agrees that his fulfillment of his obligations under this Consent Order shall be included as a condition of any term of supervised release imposed by the Court as part of his sentence.

24. The United States shall use the Forfeited Property to establish a fund to pay restitution to victims of Defendant's criminal conduct. The terms pursuant to which this fund wilt be established, and the means by which victims and other eligible claimants may file claims for compensation shall be set forth in a separate proposed Order, which the government shall submit to the Court for its approval within sixty days after the entry of this Consent Order of Forfeiture.

25. Upon receipt of any and all amounts paid towards the Forfeiture Judgment, the United States Marshals Service shall, after paying for any and all of its expenses incurred in this action, deposit the amounts received into the fund specified in the preceding paragraph. If such a fund has not been created by the time the Marshals Service receives payments towards the Forfeiture Judgment, then the Marshals Service shall maintain custody of any and all amounts it receives until such time as the fund specified in the previous paragraph has been established.

26. Upon the entry of this Consent Order, and pursuant to 21 U.S.C. § 253(n); as incorporated by 18 U.S.C. § 982(b)(1), the United States Marshals Service will publish notice of the terms of this Consent Order, and of the Marshals Service's intent to dispose of the Forfeited Property pursuant

to this Consent Order, in such a manner as the Attorney General of the United States may direct. The United States may also, to the extent practicable, provide written specific notice to any person known to have an alleged interest in the Forfeited Property, as a substitute for published general notice as to those persons so notified.

27. Any person, other than Defendant, who asserts a legal interest in the Forfeited property, may, within thirty days of the final publication of general notice or of receipt of specific notice, whichever is earlier, petition the court for a heating to adjudicate the validity of his alleged interest in said property. The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title or interest in the property, any additional facts supporting the petitioner's claim and the relief sought. A copy of the petition and all supporting documents shall be served upon the undersigned counsel for the United States.

28. In accordance with FED. R. CRIM. P. 32.2, in the event the Forfeiture Judgement is not satisfied in full on or before the Due Date, the government is hereby authorized to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties.

29. Upon adjudication of all third-party interests, or in the absence of any claims or petitions filed by third parties, the Court will enter a Final Order of Forfeiture pursuant to 21 U.S.C. § 853(n), as incorporated by 18 U.S.C. § 982(h)(1), in which ail interests will be addressed.

30. Defendant and his wife, Mrs. Nita Shuster, shall not assert a claim and shall not assist others to assert a claim to the Forfeited Property in any administrative or judicial proceeding. Any claim filed by Defendant or his wife, or filed by a third party assisted by Defendant or his wife, is hereby deemed to be null, void, and of no legal effect.

31. Defendant has knowingly and voluntarily waived his right m a jury trial on the forfeiture of the Forfeited Property, has waived his right to any required notice: concerning the forfeiture and has also waived all constitutional, legal, and equitable defenses to the forfeiture of such assets, including, but not limited to, defenses based on double jeopardy, *ex-post facto* application of any applicable statute, any applicable statute of limitations, or the Excessive Fines Clause of the Eighth Amendment.

32. This Consent Order of Forfeiture shall not prejudice the right of the Defendant to appeal any aspect of his underlying judgment of conviction or of the sentence imposed on him by this Court other, than the imposition of this Forfeiture Judgment However, Defendant waives his fight to appeal from the Forfeiture Judgment and shall not move for the vacatur of, or otherwise object to the imposition of, said Forfeiture Judgement before any appellate court. In the event Defendant's underlying judgement of conviction is vacated or reversed on appeal, this Consent Order of Forfeiture shall also be vacated, without prejudice to the government's fights to seek (i) to restrain Defendant's assets pending further proceedings before this Court on remand from the court of appeals, mid (ii) to retain may and all funds which Defendant has paid towards the Forfeiture Judgment, as of the time of the vacatur, and (iii) to place an amount equal to the amount of such payments in an interest-bearing escrow account to abide the outcome of any further proceedings against Defendant, including, but not limited to, further proceedings to obtain a criminal forfeiture money judgement, or order of restitution against Defendant. In the event the Defendant's conviction is affirmed but the appellate court reverses or remands as to his sentence, this Consent Order of Forfeiture shall remain in full force and effect, unless it has been expressly modified or vacated by this Court or by an appellate court, and thc United States shall be entitled to keep all moneys which Defendant has paid towards the Forfeiture Judgment.

33. This Consent Order shall be binding upon the Defendant and his successors, administrators, heirs, assigns, and transferees, and the Forfeiture Judgment shall not be dischargeable in bankruptcy, if any, but shall survive any bankruptcy of the Defendant. To the extent the Champion Hills Property is involved, this Consent Order shall also be binding on Defender's wife, Mrs. Nita Shuster, who by signing this Order expressly consents to the Court's personal and subject matter jurisdiction over her to the extent necessary to enforce this Order. In the event that Defendant and his wife divorce, or either of them dies, prior to Defendant's complete satisfaction of the Forfeiture Judgment, this Consent Order shall not be affected but shall survive any such divorce or death.

34. Each of the parties signing this Consent Order represents that he or she has the full power and authority to enter into this Consent Order and to perform the obligations set forth herein. Defendant and his wife, Mrs. Nita Shuster, each represent that no other persons or entities have ownership interests in the Champion Hills Property, except to the extent that there may already be liens or deeds of trust on the property. Likewise, in the promissory notes and deeds of trust called for called for by paragraphs 8(c)(i) and 8(d)(i) above, 1990 Westwood Blvd., Inc. and Shanalee Plaza, Inc., shall each certify and agree that no other persons or entities have ownership interests in any property identified in paragraphs 8(c)(i) and 8(d)(i), above, respectively, except to the extent that there may already be liens or deeds of trust on the properties.

35. Pursuant to FED. R. CRIM. P. 32.2(b)(3), this Consent Order of Forfeiture is final as to Defendant and shall be made part of the Defendant's sentence and shall be included in the Judgement of conviction.

36. The Clerk of the Court shall forward eight certified copies of tins Consent Order of Forfeiture to Assistant United States Attorney F. Franklin Amanat, One Pierrepont Plaza, 16th Floor, Brooklyn, NY 11201-2776.

Upon receipt of said certified copies, the Assistant United States Attorney shall serve copies on Defendant, Defendant's wife Mrs. Nita Shuster, 1990 Westwood Blvd., Inc., and Shanalee Plaza, Inc..

37. Throughout this Consent Order, wherever Assistant United States Attorney F. Franklin Amanat is referred to personally, said reference shall be construed as a reference to any other Assistant United States Attorney whose appearance may be substituted for Mr. Amanat in the future; the government shall communicate said substitution in writing to counsel for the Defendant, and it need not be filed with or "So Ordered" by the Court.

38. This Consent Order shall be final and binding only upon being "So Ordered" by the Court. This Court shall retain jurisdiction over this action to enforce compliance with all of the terms and conditions of this Consent Order.

Dated: Brooklyn, New York
June 18, 2002

ALAN VINEGRAD
United States Attorney
Eastern District of New York
One Pierrepont Plaza, 16th Floor
Brooklyn, NY 11201-2776
By: _____
F. Franklin Amanat (FA6117)
Adam Schuman
Assistant United States Attorneys
(718) 254-6024/7000

AGREED AND ACCEPTED
BY:_____
Harry Shuster, Defendant

APPROVED BY:
O'Melveny & Myerslip
153 East 53rd Street

New York, NY 10022-4611
By: _____
Alan M. Cohen (AC8295)
Jeremy Maltby
Counsel for Defendant
(212) 326-2276

Supreme Court, U.S.
FILED
DEC 5 - 2003
OFFICE OF THE CLERK

No. 03-396

In the Supreme Court of the United States

HARRY SHUSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
CHRISTOPHER A. WRAY
Assistant Attorney General
STEVEN L. LANE
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the admission of redacted depositions at petitioner's trial violated the "rule of completeness" reflected in Federal Rule of Evidence 106.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Beech Aircraft Corp. v. *Rainey*, 488 U.S. 153 (1988)	10
Echo Acceptance Corp. v. *Household Retail Servs., Inc.*, 267 F.3d 1068 (10th Cir. 2001)	8
United States v. *Awon*, 135 F.3d 96 (1st Cir. 1998)	7, 8, 10
United States v. *Collicott*, 92 F.3d 973 (9th Cir. 1996)	7
United States v. *Costner*, 684 F.2d 370 (6th Cir. 1982)	7
United States v. *LeFevour*, 798 F.2d 977 (7th Cir. 1986)	7-8, 10
United States v. *Guevara*, 277 F.3d 111 (2d Cir. 2001), cert. denied, 123 S. Ct. 1613 (2003)	7
United States v. *Pendas-Martinez*, 845 F.2d 938 (11th Cir. 1988)	8
United States v. *Sutton*, 801 F.2d 1346 (D.C. Cir. 1986)	7, 8, 10
United States v. *Wilkerson*, 84 F.3d 692 (4th Cir. 1996), cert. denied, 522 U.S. 934 (1997)	7
United States v. *Williams*, 548 F.2d 228 (8th Cir. 1977)	8
United States v. *Woolbright*, 831 F.2d 1390 (8th Cir. 1987)	8

Statutes and rules: Page

15 U.S.C. 78j(b) 2, 3
18 U.S.C. 371 ..... 2, 3
18 U.S.C. 1956(h) 2, 3
Fed. R. Crim. P. 15 8
Fed. R. Evid.:
Rule 106 ..... 5, 7, 9, 10
Rule 804(b)(3) 3
Rule 806 ..... 4, 7
Rule 807 4

In the Supreme Court of the United States

No. 03-396

HARRY SHUSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A7-A12) is not published in the *Federal Reporter*, but is *available at* 67 Fed. Appx. 645.[1]

JURISDICTION

The judgment of the court of appeals was entered on June 10, 2003. The petition for a writ of certiorari was filed on September 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The court of appeals' separate opinion addressing the government's appeal of petitioner's sentence (Pet. App. A1-A6) is reported at 331 F.3d 294.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to commit securities fraud, in violation of 18 U.S.C. 371; securities fraud, in violation of 15 U.S.C. 78j(b); and conspiring to launder money, in violation of 18 U.S.C. 1956(h). Pet. App. B1. He was sentenced to 72 months of imprisonment, to be followed by three years of supervised release. *Id.* at B2. The court of appeals affirmed. *Id.* at A7-A12.

1. From approximately 1993 through 1997, petitioner participated in a "boiler room" scheme through which he arranged purchases from, and sales to, Stratton-Oakmont, Inc., a broker-dealer, of stock issued in several initial public offerings (IPOs). The scheme resulted in an artificial inflation of stock prices, from which petitioner profited by more than $2 million. Pet. App. A3.

Among other things, petitioner made several pre-arranged stock sales to Stratton-Oakmont upon his receipt of free stock provided to him as consideration for "bridge" loans he made to IPO issuers. Gov't C.A. Br. 3. Those "flips" and bridge loans provided Stratton-Oakmont with IPO stock that it could not purchase itself, and allowed Stratton-Oakmont to artificially inflate prices by controlling the supply of stock. *Ibid.* Petitioner and the principals of Stratton-Oakmont used Plus One Finance, Ltd., an off-shore entity controlled by petitioner, to conceal from securities regulators and tax officials the illegal gains produced by their "flip" and bridge loan transactions. *Id.* at 3-4. They also arranged for the discounted sale of unregistered stock to Plus One under Regulation S, an SEC regulation allowing certain transfers of unregistered securities to

foreign purchasers, and they resold the stock in the United States at a large profit. Petitioner and his co-conspirators falsely asserted that Plus One was a foreign purchaser, when Plus One in fact was under petitioner's control. *Id.* at 4.

On October 26, 2000, a grand jury returned a superseding indictment charging petitioner with conspiring to commit securities fraud, in violation of 18 U.S.C. 371 (Count 1); securities fraud, in violation of 15 U.S.C. 78j(b) (Counts 2-6); and conspiring to launder money, in violation of 18 U.S.C. 1956(h) (Count 7). 10/26/00 Superseding Indictment 8-26.

2. Before trial, the district court granted petitioner's motion to take the depositions of several persons outside the United States, including Walton Imrie and Stephen Screech, two asset managers at a Swiss investment firm, Kestrel S.A., who managed the affairs of Plus One for petitioner. Pet. 4. In his motion, petitioner asserted that "the essence of [petitioner's] alleged misconduct is his alleged ownership of Plus One," and that the requested depositions would establish that petitioner's mother rather than petitioner "was the beneficial owner of Plus One." Defendant's Motion to Take Depositions Under Federal Rule of Criminal Procedure 15(a) at 4-5.

The government moved *in limine* to exclude portions of the Imrie and Screech depositions from evidence as inadmissible hearsay, including testimony by Imrie and Screech that petitioner's family friend, Montague Koppel, had indicated to them that at least some Plus One assets were owned by petitioner's South African parents. 6/27/01 Gov't Letter to Dist. Ct. 2-3, 5-6. In response, petitioner argued that Koppel's statements to Imrie and Screech were admissible (1) under Federal Rule of Evidence 804(b)(3) as statements against

Koppel's penal and pecuniary interests; (2) for the non-hearsay purpose of explaining the deponents' conduct; (3) under Rule 806 to explain other hearsay statements petitioner expected the government to use at trial; or (4) under Rule 807, the residual exception to the hearsay rule. 7/02/01 Pet. Letter to Dist. Ct. 2-11. The district court rejected petitioner's contentions and granted the government's motion to redact the depositions. 7/05/01 Tr. 47-49.[2]

At trial, the government presented the live testimony of two of petitioner's co-conspirators, Jordan Belfort and Bryan Herman, who described petitioner's role in the fraudulent scheme. Gov't C.A. Br. 5-13. The government also introduced four binders of documents produced by Kestrel S.A. that demonstrated petitioner's control over Plus One as well as his use of Plus One to evade Regulation S and engage in numerous fraudulent stock transactions. *Id.* at 15-17. The government read the redacted versions of the Imrie and Screech depositions to the jury to explain the documents in the Kestrel binders and further describe petitioner's fraudulent conduct.[3]

Early in the trial, petitioner submitted a letter to the court in which he argued for the first time that "Imrie's testimony that * * * Koppel * * * told [Imrie] that certain funds belonged to [petitioner's father] and to

---

[2] The court left open the possibility that Koppel's hearsay statements might be admissible if a particular declaration signed by Screech and Imrie (Form A), which reflected that petitioner was the beneficial owner of Plus One's funds, was admitted into evidence at trial. That declaration was not offered into evidence. Gov't C.A. Br. 55 n.9.

[3] 7/16/01 Tr. 1124-1130; 7/17/01 Tr. 1146-1237, 1336-1484; 7/18/01 Tr. 1523-1650, 1654-1754; 7/23/01 Tr. 2019-2247; 7/24/01 Tr. 2280-2296.

Koppel" should be admitted under the rule of completeness reflected in Federal Rule of Evidence 106. Pet. App. D2. Rule 106 provides that, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Petitioner asserted in his letter that, "[a]s redacted by the government, the [Imrie deposition] testimony now suggests that Imrie testified that he received the money for [petitioner] and took instructions from [petitioner] without any reference to the witness' understanding of whose funds he was holding." Pet. App. D3. Petitioner argued that the additional testimony he identified "should * * * be admitted so that the jury is not left with a misleading impression of [Imrie's] overall testimony." *Ibid.*

After the government had read a substantial portion of the redacted Imrie deposition to the jury, defense counsel again objected, asserting that "the testimony as redacted * * * distorts for the jury what was said by Mr. Koppel and understood by Mr. Imrie and I renew my application to have read to the jury the rest of the instructions that were given by Mr. Koppel to Mr. Imrie." 7/17/01 Tr. 1484-1485. The district court overruled the objection, stating that the "testimony regarding what Koppel said about the origin of the funds in Plus One finance that it was the parent's [sic] funds is an application to offer what is plainly hearsay. It's offered for the truth of it." *Id.* at 1485. The court added, "[e]xcluding it does not in the slightest fashion in my judgment render misleading the rest of this testimony in any way." *Ibid.* Later in the trial, after portions of the Screech deposition had been read to the

jury, petitioner moved for a mistrial "based on the completely distorted view that the Imrie and Screech testimony has provided this jury, as redacted." 7/23/01 Tr. 2208-2209. The district court denied the motion. *Id.* at 2009. At the conclusion of the trial, the jury found petitioner guilty on all counts.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A7-A12. The court held, *inter alia*, that "[t]he District Court did not exceed its discretion in determining that Koppel's [hearsay] statements [as related] in the depositions of Stephen Screech and Walton Imrie did not qualify as statements against interest under Fed. R. Evid. 804(b)(3)," and that, "[e]ven if those statements might qualify as statements against penal interest, [the district court] was entitled to conclude that the statements lacked requisite indications of reliability." *Id.* at A9.[4] The court did not specifically discuss petitioner's claim (Pet. C.A. Br. 61-62) that, even if Koppel's statements were hearsay, they nonetheless were admissible under the rule of completeness reflected in Rule 106. The court instead stated summarily that petitioner's "remaining conten-

---

[4] The court of appeals also rejected (Pet. App. A8-A12) petitioner's claims that the district court had erred in: (i) prohibiting his cross-examination of a cooperating witness concerning audiotaped statements the witness made to a third party; (ii) refusing his motion to take Koppel's deposition and rejecting his claim that the government improperly failed to assist him in obtaining Koppel's live testimony at trial; (iii) excluding as inadmissible hearsay the affidavits of foreign witnesses and petitioner's mother; (iv) admitting evidence of petitioner's prior fraudulent conduct as evidence of his knowledge and intent; and (v) determining his sentence under the Sentencing Guidelines. Petitioner does not challenge those determinations in this Court.

tions have been considered and rejected as lacking merit." Pet. App. A12.

ARGUMENT

Petitioner renews his contention (Pet. 9-13) that the district court erred under Federal Rule of Evidence 106 by admitting redacted versions of the Imrie and Screech depositions. That contention does not warrant review.

Petitioner is correct in observing (Pet. 9-11) that the courts of appeals have expressed disagreement about whether the rule of completeness in Rule 106 can provide a basis for admitting evidence that otherwise would be inadmissible. The courts of appeals for the Second, Sixth, and Ninth Circuits have held that Rule 106 merely addresses the order of proof and does not contemplate the admission of evidence that is otherwise inadmissible. *United States* v. *Guevara*, 277 F.3d 111, 127 (2d Cir. 2001), cert. denied, 123 S. Ct. 1613 (2003); *United States* v. *Collicott*, 92 F.3d 973, 983 (9th Cir. 1996); *United States* v. *Costner*, 684 F.2d 370, 373 (6th Cir. 1982); see *United States* v. *Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) ("even if * * * Rule 106 had applied to this testimony, it would not render admissible the evidence which is otherwise inadmissible"), cert. denied, 522 U.S. 934 (1997). The courts of appeals for the First and D.C. Circuits, by contrast, have stated that Rule 106 "concerns the substance of evidence" and "can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously." *United States* v. *Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986); accord *United States* v. *Awon*, 135 F.3d 96, 101 (1st Cir. 1998). Cf. *United States* v. *LeFevour*, 798 F.2d

977, 981 (7th Cir. 1986) (stating in dicta that if otherwise inadmissible evidence is necessary to correct misleading impression, then it either is admissible for that limited purpose or, if it is inadmissible (*e.g.*, because of privilege), the misleading evidence must also be excluded).[5] There is no warrant for reviewing that issue in this case, however, because the decisions below do not squarely implicate the disagreement on whether Rule 106 provides a basis for admitting evidence that would otherwise be inadmissible.

First, whereas the decisions relied on by petitioner involved the admission into evidence of conversations recorded by a cooperating witness, see *Sutton*, 801 F.2d at 1356, 1366-1368; *LeFevour*, 798 F.2d at 980-982, or of recorded statements made to the police, see *Awon*, 135 F.3d at 99, 101, this case involves the admission of testimony in a deposition. Because the purpose of a deposition is to preserve the witness's testimony for trial, see

---

[5] Although petitioner asserts (Pet. i) that the Third Circuit agrees with the First, Seventh, and District of Columbia Circuits, he cites no Third Circuit decision resolving the issue, and there appears to be none. The Eighth Circuit has held that Rule 106 does not empower a court "to admit *unrelated* hearsay in the interest of fairness and completeness when that hearsay does not come within a defined hearsay exception." *United States* v. *Woolbright*, 831 F.2d 1390, 1395 (8th Cir. 1987) (emphasis added). That court has suggested, however, that when one portion of a conversation is admitted into evidence, the rule of completeness might permit the admission of related portions of the same conversation that otherwise would be inadmissible hearsay. *United States* v. *Williams*, 548 F.2d 228, 232 n.14 (8th Cir. 1977). The Tenth and Eleventh Circuits have noted the disagreement identified by petitioner without resolving the issue. *Echo Acceptance Corp.* v. *Household Retail Servs., Inc.*, 267 F.3d 1068, 1089 n.12 (10th Cir. 2001); *United States* v. *Pendas-Martinez*, 845 F.2d 938, 944 & n.10 (11th Cir. 1988).

Fed. R. Crim. P. 15(a), the parties are aware at the time of the deposition that any statements constituting inadmissible hearsay will not be admissible at trial. There thus is no unfairness under Federal Rule of Evidence 106 in applying the general hearsay rules to deposition testimony sought to be introduced at trial.

In addition, contrary to petitioner's suggestion (Pet. 13), the district court did not overrule his request to offer the hearsay statements only on the ground that Rule 106 permits the introduction only of evidence that is otherwise admissible. Rather, as to the Imrie testimony, the court found that excluding the redacted portions did "not in the slightest fashion * * * render misleading the rest of this testimony in any way." 7/17/01 Tr. 1485. When petitioner later moved for a mistrial on the ground that both the Screech testimony and Imrie testimony were misleading as redacted, the court denied the motion without elaboration. 7/23/01 Tr. 2208-2209. The court of appeals summarily affirmed the district court's rulings without discussion. Pet. App. A12.[6]

Rule 106 expressly requires the admission only of those additional portions of a writing or recorded statement "which ought in fairness to be considered contemporaneously with" parts that have been introduced. Fed. R. Evid. 106. Accordingly, this Court has explained that Rule 106 applies "when one party has made use of a portion of a document" and "misunderstanding

---

[6] The government argued in the court of appeals that the excluded testimony was inadmissible hearsay, that petitioner did not timely object to admission of those portions of the redacted testimony alleged to be misleading, that exclusion of the redacted portions did not render the testimony misleading, and that Rule 106 does not afford a basis for introducing evidence that is otherwise inadmissable. Gov't C.A. Br. 57-63.

or distortion can be averted only through presentation of another portion." *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 172 (1988).[7] The decisions cited by petitioner agree that Rule 106 permits the introduction only of additional portions of a document that are necessary to avoid misleading the trier of fact by qualifying, explaining, or placing into context the portions already introduced. *Awon*, 135 F.3d at 101 (statements not admissible under Rule 106 because not needed to correct any misunderstanding or distortion); *Sutton*, 801 F.2d at 1369 (Rule 106 "should be interpreted to incorporate the common-law requirements that the evidence be relevant, and be necessary to qualify or explain the already introduced evidence allegedly taken out of context"); *LeFevour*, 798 F.2d at 981-982 (additional portion of recorded statement not admissible under Rule 106 because no misleading impression was created by parts played to jury). Because the district court in this case found that the Imrie testimony as redacted was not misleading, and because neither the district court nor the court of appeals suggested that the Screech testimony was misleading, the opinions below do not conflict with the decisions cited by petitioner.[8]

Insofar as petitioner claims that the redacted testimony in this case was misleading, that factbound contention does not warrant review. Such a contention

---

[7] The Court did not address in *Beech Aircraft Corp.* whether Rule 106 can provide a basis for admitting evidence that otherwise would be inadmissible. See 488 U.S. at 172-173 & n.18.

[8] Those decisions also suggest that the question whether Rule 106 allows the introduction of otherwise inadmissible hearsay is not of great practical significance. *Awon*, 135 F.3d at 101 (no error under Rule 106 because hearsay statements not misleading); *LeFevour*, 798 F.2d at 981-982 (same); *Sutton*, 801 F.2d at 1369 (error in refusing to admit clarifying statements harmless).

would lack merit in any event. As read to the jury, the redacted Screech and Imrie depositions established that petitioner directed the investments made by Plus One, a fact that the defense never disputed. The hearsay statements of Koppel related in the Imrie and Screech depositions concerned a different issue—the *ownership* of Plus One—and the redacted depositions do not state whether petitioner or his parents owned Plus One. The district court recognized that distinction in leaving open the possibility that it would permit the introduction of the redacted hearsay if the government opened the door by offering into evidence a particular declaration signed by Screech and Imrie (Form A) indicating that petitioner, not his parents, owned Plus One's funds. See note 2, *supra*; 7/10/01 Tr. 47-49. The government did not offer the Form A at trial. *Id.* at 88, 99.

Instead, the government established through a variety of other evidence that petitioner himself owned Plus One and had a history of claiming that others owned it when such claims suited his immediate needs. The government demonstrated, for instance, that petitioner had admitted ownership of Plus One to a cooperating witness. 7/11/01 Tr. 419-420, 444-445. The government also established that petitioner first claimed that Plus One was owned by his parents only after his indictment. For the decade before that, he signed numerous filings with the SEC identifying Imrie as the beneficial owner of Plus One, filings Imrie himself testified were false. 7/30/01 Tr. 3022-3027. Further, in the mid-1990s, petitioner caused Imrie to file a letter with the NASDAQ stock market that stated that neither petitioner nor any of his family members had an ownership interest in Plus One. 7/19/2001 Tr. 1857-1861. Finally, petitioner's claim that he established

Plus One to shield his parents' savings from the political and economic turmoil that then existed in South Africa was inconsistent with the investments Plus One made. For example, among the first investments petitioner directed Kestrel S.A. to make on Plus One's behalf was the purchase of South African currency, an investment that was highly sensitive to political and economic instability in that country. 7/30/01 Tr. 3029-3031. Rule 106 did not entitle petitioner to introduce Koppel's hearsay statements in the Imrie and Screech depositions in an effort to rebut that separate evidence concerning ownership of Plus One.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
CHRISTOPHER A. WRAY
Assistant Attorney General
STEVEN L. LANE
Attorney

DECEMBER 2003

---

[9] Petitioner sought to introduce an affidavit by Koppel suggesting that petitioner merely managed Plus One funds on his parents' behalf. The district court refused to allow Koppel's affidavit, and the court of appeals upheld the district court's determination that the affidavit lacked "corroborating circumstances indicating the trustworthiness of these statements." Pet. App. A10.

(3)

No. 03-396

Supreme Court, U.S.
FILED
DEC 22 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HARRY SHUSTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

WALTER E. DELLINGER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

JEREMY MALTBY*
(*Counsel of Record*)
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90004
(213) 430-6000
**Admitted in New York and the District of Columbia*

ALAN M. COHEN
O'MELVENY & MYERS LLP
153 East 53rd Street
New York, NY 10022
(212) 326-2000

Attorneys for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

CASES

Irons v. F.B.I.,
880 F.2d 1446 (1st Cir. 1989) 2

Trepel v. Roadway Exp., Inc.,
194 F.3d 708 (6th Cir. 1999) 2

United States v. Awon,
135 F.3d 96 (1st Cir. 1998) 3

United States v. Guevara,
277 F.3d 111 (2d. Cir. 2001), *cert. denied*,
123 S. Ct. 1613 (2003) 6

United States v. LeFevour,
798 F.2d 977 (7th Cir. 1986) 3

United States v. Oseby,
148 F.3d 1016 (8th Cir. 1998) 2

United States v. Simonelli,
237 F.3d 19 (1st Cir. 2001), *cert. denied*,
534 U.S. 821 (2001) 3

United States v. Sutton,
801 F.2d 1346 (D.C. Cir. 1986) 2

RULES

Fed. R. Evid. 106 2

Fed. R. Evid. 801 8

Fed. R. Evid. 804 8

TABLE OF AUTHORITIES
(continued)

Page(s)

TREATISES

1 Stephen A. Salzburg et al., *Federal Rules of Evidence Manual* § 106.02[3] (8th ed. 2002) 3, 7

1 Weinstein's Federal Evidence § 106.03 (2d ed. 2003) 7

REPLY BRIEF FOR PETITIONER

The Solicitor General's brief in opposition ("S.G. Br.") concedes that the federal courts of appeals are sharply divided on the proper interpretation of Rule 106 of the Federal Rules of Evidence and that the government needed to establish petitioner's ownership of Plus One Finance Limited ("Plus One") in order to prove his guilt. These concessions make clear that this case presents an important question whose resolution bears directly on petitioner's conviction, and thus that the petition warrants this Court's review.

To divert this Court from that straightforward conclusion, the Solicitor General claims that this petition does not squarely present the question upon which the courts have disagreed, seeks to minimize the importance of that question, and also argues that other evidence in any event established petitioner's ownership of Plus One. These arguments are insubstantial. This Court should grant certiorari to answer an important and recurring question that has long divided the courts of appeals and to reverse a ruling that enabled the government to present the jury with fundamentally distorted testimony about the central issue at trial.

1. The Solicitor General concedes that the federal courts of appeals disagree about whether Rule 106 authorizes the admission of otherwise inadmissible hearsay when the redaction of a written statement to eliminate hearsay would create a misleading impression about the meaning of the entire statement. S.G. Br. 7-8. The Solicitor General argues that the cases interpreting Rule 106 broadly to allow the introduction of otherwise inadmissible hearsay are distinguishable because they did not involve "the admission of testimony in a deposition." *Id.* at 8. The Solicitor General claims that because a deposition seeks to preserve testimony for trial, "parties are aware at the time of the deposition that any statements constituting inadmissible hearsay will not be admissible at trial" and that there is thus "no unfairness" in ap-

plying the general hearsay rules to deposition testimony offered at trial. *Id.* at 8-9. This circular argument ignores the text and purpose of Rule 106 and the reasoning of the cases holding that the Rule permits the introduction of otherwise inadmissible hearsay.

The text of Rule 106 does not distinguish between depositions and other forms of written or recorded statements. Rather, it applies when "a writing or recorded statement or part thereof is introduced by a party." Fed. R. Evid. 106. The Solicitor General has identified no principle and no case law that would justify excluding depositions alone from the universe of "writing[s] and recorded statement[s]" that trigger the application of the rule. Indeed, courts routinely apply Rule 106 to deposition testimony just as they apply it to other documents and writings. *See, e.g.*, *Trepel v. Roadway Exp., Inc.*, 194 F.3d 708, 718 (6th Cir. 1999) (vacating damages award so that district court could consider whether redaction of deposition was misleading); *United States v. Oseby*, 148 F.3d 1016 (8th Cir. 1998) (affirming district court decision allowing government to read jury deposition testimony arguably containing hearsay because it was "continuation" of non-hearsay testimony).

Though the cases that have adopted a broad reading of Rule 106 did not involve deposition testimony, this is a distinction without a difference. These cases have explained that the basic purpose of Rule 106 is "to correct a misleading impression created by taking matters out of context," *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986) (quoting Fed. R. Evid. 106, Advisory Committee Note), and that the rule "can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously." *Id.*; *see also Irons v. F.B.I.*, 880 F.2d 1446, 1453 (1st Cir. 1989) (Breyer, J.) (explaining that the "rule of completeness" allows the in-

troduction of evidence that "would not by itself have been admissible" in order to "avoid unfairness to others, such as adversaries in litigation who might suffer harm were a fact-finder to be misled, say, by a partial disclosure of relevant information"); *United States v. LeFevour*, 798 F.2d 977, 980-82 (7th Cir. 1986) (Posner, J.) (The "'completeness' rule codified in Rule 106" seeks to ensure that "a misleading impression created by taking matters out of context is corrected on the spot" and therefore allows the admission of "otherwise inadmissible evidence"). Authorities advocating this approach advance the same rationale. *See, e.g.*, 1 Stephen A. Salzburg et al., *Federal Rules of Evidence Manual* § 106.02[3], at 106-5 (8th ed. 2002) ("A party should not be able to admit an incomplete statement that gives an unfair impression, and then object on hearsay grounds to completing statements that would rectify that unfairness.") ("*Evidence Manual*"). The reasoning of these courts and commentators applies with full force to deposition testimony. Thus, the First Circuit has applied the reasoning of its ruling in *United States v. Awon*, 135 F.3d 96 (1st Cir. 1998), to allow the admission under Rule 106 of hearsay contained in the closely analogous context of grand jury testimony. *See United States v. Simonelli*, 237 F.3d 19, 28 (1st Cir. 2001), *cert. denied*, 534 U.S. 821 (2001).

The Solicitor General's circular "fairness" argument, *see* S.G. Br. 8-9, offers no good reason for Rule 106 to treat depositions differently than other documents. Though parties to a deposition may be aware that certain statements could be excluded as hearsay at trial, they cannot identify such statements with certainty in advance. More important, parties have no reason to suppose during a deposition that the trial court may later allow the admission of testimony redacted in a fundamentally misleading manner. To the contrary, parties reasonably expect that if a court cannot eliminate inadmissible materials without rendering the remaining portions misleading, it will exclude the deposition in its en-

tirety. Fundamental fairness demands nothing less. In short, the fact that this case involves a redacted deposition presents no meaningful distinction from the cases holding that Rule 106 permits the admission of otherwise inadmissible evidence. The Courts of Appeals disagree fundamentally about the scope of the rule of completeness embodied in Rule 106. An insignificant factual distinction will not bridge that difference; only intervention by this Court can resolve it.

2. The Solicitor General also suggests that this petition does not warrant this Court's review because the district court found that the redaction of Walton Imrie's deposition was not misleading. S.G. Br. 9-10. This argument fails for two reasons. First, the district court did not make such a definitive ruling. Second, even if the district court had found that the redaction of Imrie's testimony was not misleading, the Court of Appeals, following its longstanding reading of Rule 106, never reviewed that highly questionable conclusion, which was reversible under the clearly erroneous standard. For these reasons, if this Court rejects the Second Circuit's view of Rule 106, it will likely result in the reversal of petitioner's conviction.

a. As the Solicitor General recognizes, *see* S.G. Br. 4-5, petitioner objected to the proposed redactions of the deposition testimony of Imrie and Stephen Screech before the reading of those depositions to the jury. Petitioner claimed that the redactions were misleading and that Rule 106 permitted the admission of the hearsay statements needed to cure any misimpression. *See* Pet. App. D2-D3. The district court never addressed these objections, suggesting that the court believed itself bound by circuit precedent prohibiting the admission of hearsay under Rule 106. When petitioner objected during trial to the admission of specific statements without proper context, 7/17/01 Tr. 1484-85, the district court began by denying the requested clarification on the ground that the additional testimony was hearsay. *Id.* at

1485. As the Solicitor General notes, S.G. Br. 5, the district court went on to observe that "excluding [the hearsay] does not in the slightest fashion in my judgment render misleading the rest of the testimony in any way." 7/17/01 Tr. 1484-85.

The Solicitor General contends that this offhand statement conveyed a finding that all of the redactions, taken together, were not misleading. There is ample reason to doubt this conclusion. For example, immediately after making the statement quoted above, the district court castigated petitioner's counsel for failing to object to the particular testimony that he considered misleading: "If you thought some of the testimony in here is rendered misleading because of the excised testimony, then you should have objected to the reading of the testimony that you now claim is misleading." 7/17/01 Tr. 1485. The district court then noted its reluctance to "get lost in . . . far flung minutia about this case." *Id.* Because petitioner had plainly preserved his objection to the misleading overall effect of the redaction, S.G. Br. 4-5, these comments suggest that the district court was focused on the specific objection that petitioner's counsel had just raised, and not on the cumulative effect of all the redactions. Indeed, this view finds further support in the fact that when petitioner sought a mistrial claiming that the redactions had created a "completely distorted view" of the Imrie and Screech testimony, the district court denied the motion without making any finding that the redactions were not misleading. Under the circumstances, it would be erroneous to conclude that the district court ever clearly considered and then made a finding that the redactions were not misleading.

b. Even if the district court had explicitly found that the redaction of the Imrie deposition was not misleading, such a finding would not render this case unsuitable for this Court's review. Although the Court of Appeals reviewed other findings of the district court, *see* Pet. App. A8-A12, it never passed upon the district court's supposed conclusion that the

redaction was misleading. This omission was understandable, as circuit precedent firmly established that hearsay remains inadmissible under Rule 106, whether or not it is misleading. *See United States v. Guevara*, 277 F.3d 111 (2d. Cir. 2001), *cert. denied*, 123 S. Ct. 1613 (2003).

If the district court did find that the redacted testimony was not misleading, that finding would be extremely vulnerable to reversal by the Court of Appeals, if appellate review were not constrained by *Guevara*. As the government has now conceded, establishing petitioner's ownership of Plus One was essential to its case at trial. In its redacted form, the testimony of Imrie and Screech was the government's strongest evidence on this point. That testimony established that for more than five years petitioner gave investment instructions about the funds in Plus One, and that Imrie and Screech executed all those instructions without hesitation. This testimony showed that petitioner exercised effective control over funds in excess of two million dollars. But by excising all testimony explaining that Imrie and Screech accepted petitioner's instructions without reservation because they had been told that he was managing the funds for his parents, the district court left the jury with only one possible conclusion: that petitioner could exercise control over Plus One because he owned it.

The misleading quality of such a redaction is apparent. The district court's approach was analogous to allowing testimony that a professional money manager directed the investment of an account, while excising all evidence that he was an investment advisor with discretionary authority to manage the account. Under those circumstances, a jury determining the ownership of the funds could only conclude that the money manager was the beneficial owner. In the same way, the district court's redaction fundamentally distorted the testimony of Screech and Imrie and rendered it

entirely misleading.[1] To the extent that the district court ruled otherwise, that finding was clearly erroneous. But the Second Circuit's misreading of Rule 106 prevented it from reviewing that question. A ruling by this Court clarifying the application of Rule 106 would allow the Second Circuit to undertake a proper review of the record, and would therefore have a material impact on the proceedings below.

3. Finally, citing two cases that have held the exclusion of misleading hearsay to be harmless error, the Solicitor General suggests in a footnote that that the question presented "is not of great practical significance." S.G. Br. 10 n.8. Lacking any empirical support, this offhand suggestion cannot be verified, and is quite wrong. As the many cases cited in these briefs and catalogued in the leading treatises on evidence make clear, the question presented in this petition arises with considerable frequency. *See Evidence Manual* § 106.3; 1 Weinstein's Federal Evidence § 106.03 (2d ed. 2003). Simple logic compels the conclusion that the Second Circuit's narrow reading of Rule 106 has considerable "practical significance." In circuits following that rule, parties may introduce their opponents' inculpatory out-of-court statements as statements against interest or statements of

---

[1] The Solicitor General contends that the redaction of the depositions was not misleading because the government presented other evidence that petitioner owned Plus One. S.G. Br. 11. This argument misses the mark because all the cited evidence was equivocal and subject to an innocent explanation. The evidence concerning petitioner's alleged admission of ownership, *see id.*, came from Jordan Belfort, a notorious fraudster and a confessed perjurer with a powerful motive to lie. Petitioner's previous statements about Plus One and his active role in its management, *see id.*, were all consistent with efforts to hide his parents' ownership of Plus One; such secrecy was necessary because South African law prohibited citizens from owning assets offshore. Standing alone, this evidence could not have carried the day. The testimony that petitioner exercised control over Plus One – misleadingly redacted to eliminate the explanation that he did so on behalf of his parents – was the strongest aspect of the government's case.

party opponents, *see* Fed. R. Evid. 801(d)(2), 804(b)(3), but related statements that provide context may remain inadmissible hearsay, even when the admission of the related statements is necessary to avoid confusion and misunderstanding. Though difficult to quantify, the impact of the Second Circuit rule is apparent. This Court should grant review to ensure uniformity.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition should be granted.

Respectfully submitted,

WALTER E. DELLINGER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

JEREMY MALTBY*
(Counsel of Record)
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90004
(213) 430-6000
**Admitted in New York and the District of Columbia*

ALAN M. COHEN
O'MELVENY & MYERS LLP
153 East 53rd Street
New York, NY 10022
(212) 326-2000

Attorneys for Petitioners